TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1916

No. 627

ELLSWORTH KELLEY, PLAINTIFF IN ERROR,

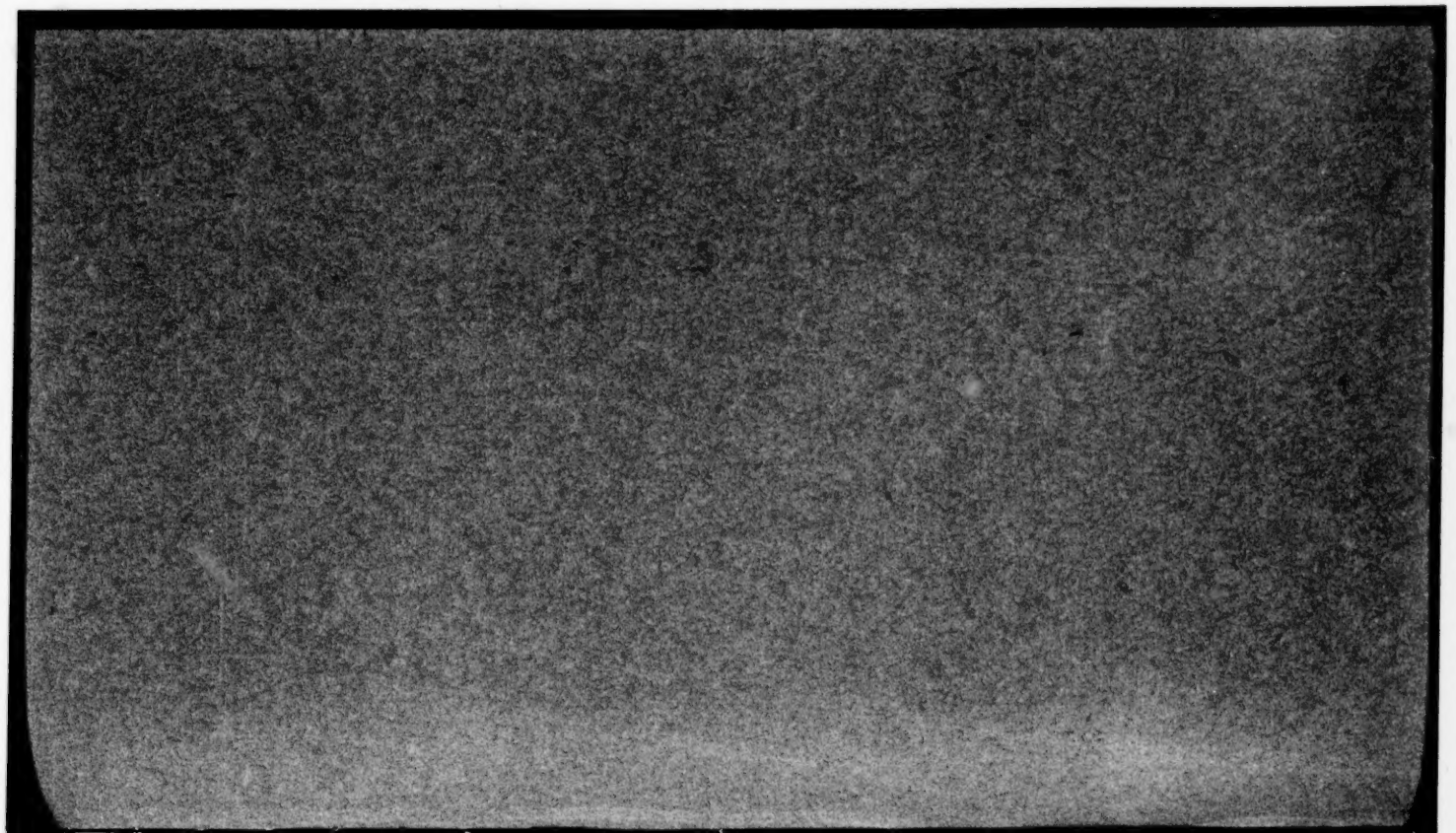
vs.

STATE OF OREGON

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON

FILED JANUARY 11, 1917

(22,324)



(32,394)

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[fol. 4]

IN CIRCUIT COURT OF MARION COUNTY

THE STATE OF OREGON, Plaintiff,

vs.

TOM MURRAY, ELLSWORTH KELLEY, and JAMES WILLOS, Defendants

INDICTMENT—Filed August 28, 1925

Tom Murray, Ellsworth Kelley and James Willos are accused by the Grand Jury of the County of Marion and State of Oregon, by this indictment of the crime of murder in the first degree, committed as follows:

The said Tom Murray, Ellsworth Kelley and James Willos on the twelfth day of August, A. D. 1925, in the County of Marion and State of Oregon then and there being did then and there unlawfully, feloniously, purposely and of deliberate and premeditated malice kill one John Sweeney by shooting him, the said John Sweeney, with a pistol, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at Salem, in the county aforesaid, this twenty-eighth day of August, A. D. 1925.

Witnesses examined before the Grand Jury: A. M. Dalrymple, Peter J. White, John Davison, W. Carlton Smith, W. E. Gardner, Leland T. Murphy, J. S. Murray, C. Moffenbier, J. B. Nesmith, Charles McKinley, Leo Wilde, Charles Newman, George Robinson, S. B. Sandefer, M. W. Miller, Z. J. Zinn.

John H. Carson, District Attorney.

[File endorsement omitted.]

[fol. 5-7] The defendants being arraigned each plead "Not Guilty" thereto.

And the court on the first day of September, 1925, being the day of such arraignment and pleas, duly received and noted such pleas and caused the same to be entered and recorded in the journal of said court.

And on the fifteenth day of October, 1925, the defendants were tried, at a joint trial, and the jury found them, and each of them, guilty; whereupon the court, on the thirtieth day of October, 1925, duly sentenced them, and each of them, to be hanged by the neck until dead, from which judgment each of said defendants on the nineteenth day of November, 1925, filed a notice of appeal; all as heretofore shown in the substitute transcript certified to the Supreme Court April 10, 1926.

STATE OF OREGON,
County of Marion, ss:

I, U. G. Boyer, the duly elected, qualified and acting County Clerk of the county aforesaid and, as such, ex-officio clerk of the Circuit Court in and for the county aforesaid, do hereby certify that the foregoing copy of indictment has been by me compared with the original, and that it is a true and correct transcript therefrom, and of the whole thereof, as the same appeared and appears of record and on file in my office, care and custody, as such clerk, and I further certify that all the recitations and matters stated in the foregoing partial transcript were by me taken from, and compared with, the original records of the above-entitled action, in my office, care and custody, as such clerk, and they are true and correct in all things; that this formal part of said substitute transcript was over-looked and omitted from said transcript when it was made and certified, April 10, 1926, and should be affixed to, and made a part thereof, as of said last date.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 28th day of April, A. D. 1926, as of the tenth day of April, A. D. 1926.

U. G. Boyer, as Clerk Aforesaid. (Seal.)

[fol. 8] IN CIRCUIT COURT OF MARION COUNTY

Department No. 1

[Title omitted]

NOTICE OF APPEAL OF DEFENDANT KELLEY—Filed November 19, 1925

To U. G. Boyer, County Clerk of Marion County, Oregon, and ex-Officio — of the Circuit Court of Marion County, Oregon, and John H. Carson, District Attorney for Marion County, Oregon:

You will please take notice that the above named defendant and appellant Ellsworth Kelley hereby appeals to the Supreme Court of the State of Oregon from the verdict rendered by the jury in the above entitled cause, in words and figures as follows:

"We, the jury in the above entitled criminal action, find the above named defendants Ellsworth Kelley, and James Willos, guitly as charged in the indictment on file herein.

A. B. Hughes, Foreman. Louise M. Hager, Helen H. Tate, Nellie B. Simpson, L. W. Durant, C. L. Parmenter, A. M. Jerman, C. R. Giggs, Thomas C. White, John C. McFarlane, J. W. Bellamy, J. W. Gamble."

and from the judgment rendered by the above named Circuit Court in the above entitled cause, which said judgment was rendered and entered on the 30th day of October, A. D. 1925, and entered in the Court Journal of the above named Court on said date, at Volume 41, Page —, which said judgment was as follows:

"Now, on this day, this cause came on for final hearing, the State of Oregon appearing by John H. Carson, District Attorney, and Lyle J. Page and Allan G. Carson, Deputy District Attorneys, the defendant Ellsworth Kelley appearing in person in custody of the Sheriff of Marion County, Oregon, as well as by Honorable Will R. King, of counsel for defendant Ellsworth Kelley; and it appearing to the court that the defendant Ellsworth Kelley has heretofore been

duly indicted, arraigned, tried and convicted of the crime of murder in the first degree upon his plea of not guilty; and it appearing to the court that two days have elapsed since said verdict was rendered, and that now is the proper time to pass sentence and judgment of the court upon said verdict, and no motions having been allowed in arrest of judgment or for a new trial, and that the time heretofore fixed by the court for the passing of sentence and judgment on [fol. 9] said verdict has arrived, and the defendant Ellsworth Kelley having been asked if he had anything to say why sentence should not be passed upon him at this time, and the defendant Ellsworth Kelley having made a statement to the court showing no good cause why sentence should not now be passed, and the court being fully advised in the premises.

Now, therefore, it is the judgment of this Court that the defendant Ellsworth Kelley be punished by death in the manner provided by law.

That on Friday, the eighth day of January, A. D. 1926, at the penitentiary of the State of Oregon, he be hanged by his neck until he is dead.

It is further ordered that within twenty days from this date the sheriff of Marion County, Oregon, deliver said defendant Ellsworth Kelley to the warden of the penitentiary of the State of Oregon, for the execution of this sentence.

Done and dated in open court this thirtieth day of October, A. D. 1925.

Percy R. Kelley, Circuit Judge."

And the above named defendant and appellant Ellsworth Kelley appeals from said judgment, and the whole thereof, to the Supreme Court of the State of Oregon.

Will R. King, Attorney for Appellant Ellsworth Kelley.

STATE OF OREGON,
County of Marion, ss:

I hereby admit service of the within Notice of Appeal in Marion County Oregon, on this 19th day of November, 1925. I further certify that I am a resident and inhabitant of said

County, and that I am District Attorney for Marion County, Oregon.

John H. Carson, District Attorney for Marion County, Ore.

STATE OF OREGON,
County of Marion, ss:

I hereby admit due and legal service of the within Notice of Appeal in Marion County, Oregon, on this 19th day of November, 1925. I further certify that I am a resident and inhabitant of said County, and that I am County Clerk of Marion County, Oregon, and Ex-Officio Clerk of the Circuit Court of Marion County, Oregon.

U. G. Boyer, County Clerk of Marion County, Oregon, and ex-Officio Clerk of the Circuit Court of Marion County, Oregon.

[fol. 10] [File endorsement omitted.]

[fol. 11] IN CIRCUIT COURT OF MARION COUNTY

[Title omitted]

NOTICE OF APPEAL OF DEFENDANT WILLOS—Filed November 19, 1925

To U. G. Boyer, County Clerk of Marion County, Oregon, and ex-Officio Clerk of the Circuit Court of Marion County, Oregon, and John H. Carson, District Attorney for Marion County, Oregon:

You will please take notice that the above named defendant and appellant James Willos hereby appeals to the Supreme Court of the State of Oregon from the verdict rendered by the jury in the above entitled cause, in words and figures as follows:

"We, the jury in the above entitled criminal action, find the above named defendants Ellsworth Kelley and James Willos, guilty as charged in the indictment on file herein.

A. B. Hughes, Foreman. Louise M. Hager, Helen H. Tate, Nellie B. Simpson, L. W. Durant, C. L. Parmenter, A. M. Jerman, C. R. Griggs, Thomas C. White, John C. McFarlane, J. W. Bellamy, J. W. Gamble."

and from the judgment rendered by the above named Circuit Court in the above entitled cause, which said judgment was rendered and entered on the 30th day of October, A. D. 1925, and entered in the Court Journal of the above named Court on said date, at Volume 41, Page —, which said judgment was as follows:

"Now, on this day, this cause came on for final hearing, the State of Oregon appearing by John H. Carson, District Attorney, and Lyle J. Page and Allan G. Carson, Deputy District Attorneys, the defendant James Willos appearing in person in custody of the Sheriff of Marion County, Oregon, as well as by Honorable Will R. King, of counsel for defendant James Willos; and it appearing to the court that the defendant James Willos has heretofore been duly indicted, arraigned, tried and convicted of the crime of murder in the first degree upon his plea of not guilty; and it appearing to the court that two days have elapsed since [fol. 12] said verdict was rendered, and that now is the proper time to pass sentence and judgment of the court upon said verdict and no motions having been allowed in arrest of judgment or for a new trial, and that the time heretofore fixed by the court for the passing of sentence and judgment on said verdict has arrived, and the defendant James Willos having been asked if he had anything to say why sentence should not be passed upon him at this time, and the defendant James Willos having made a statement to the court showing no good cause why sentence should not now be passed, and the court being fully advised in the premises.

Now, therefore, it is the judgment of this court, that the defendant James Willos be punished by death in the manner provided by law.

That on Friday, the eighth day of January, A. D. 1926, at the penitentiary of the State of Oregon, he be hanged by his neck until he is dead.

It is further ordered that within twenty days from this date the sheriff of Marion County, Oregon, deliver said defendant James Willos to the warden of the penitentiary of the State of Oregon, for the execution of this sentence.

Done and dated in open court this thirtieth day of October, A. D. 1925.

Percy R. Kelly, Circuit Judge."

And the above named defendant and appellant James Willos appeals from said judgment, and the whole thereof, to the Supreme Court of the State of Oregon.

Will R. King, Attorney for Appellant James Willos.

STATE OF OREGON,
County of Marion, ss:

I hereby admit service of the within Notice of Appeal in Marion County, Oregon, on this 19th day of November, 1925. I further certify that I am a resident and inhabitant of said County, and that I am District Attorney for Marion County, Oregon.

John H. Carson, District Attorney for Marion County, Oregon.

STATE OF OREGON,
County of Marion, ss:

I hereby admit due and legal service of the within Notice of Appeal in Marion County, Oregon, on this 19th day of November, 1925, I further certify that I am a resident and inhabitant of said County, and that I am County Clerk of Marion County, Oregon, and ex-Officio Clerk of the Circuit Court of Marion County, Oregon.

U. G. Boyer, County Clerk of Marion County, Oregon, and ex-Officio Clerk of the Circuit Court of Marion County, Ore.

[fol. 13] [File endorsement omitted.]

[fol. 14] IN CIRCUIT COURT OF MARION COUNTY, DEPARTMENT No. 1

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE

The above matter coming on for hearing before the Court upon motion of Will R. King, attorney for the above named defendant and appellant Ellsworth Kelley, for a writ of probable cause and for a stay of execution herein, the Court having inspected the files in the above entitled matter and

finding that the above named defendant Ellsworth Kelley was on the 26th day of October, A. D. 1925, duly convicted of the charge of murder in the first degree and was thereafter and on the 30th day of October, A. D. 1925, sentenced by the Court to be hanged by the neck until dead, the date for said execution being set for the 8th day of January, A. D. 1926, at the penitentiary of the State of Oregon, and the Court further finding that due notice of appeal has been served upon the County Clerk of Marion County, Oregon, and upon John H. Carson, District Attorney for said County, appealing from the judgment rendered in said matter to the Supreme Court of the State of Oregon; and it further appearing that there is reasonable grounds and probable cause for such appeal,

It is therefore ordered that the execution of the judgment in the above entitled matter be, and the same is hereby, stayed until such time as the appeal of the above entitled action is heard and disposed of in the Supreme Court of the State of Oregon.

Percy R. Kelly, Circuit Judge.

[fol. 15] In Circuit Court of Marion County, Department No. 1

[Title omitted]

Certificate of Probable Cause

The above matter coming on for hearing before the Court upon motion of Will R. King, attorney for the above named defendant and appellant James Willos, for a writ of probable cause and for a stay of execution herein, the Court having inspected the files in the above entitled matter and finding that the above named defendant James Willos was on the 26th day of October, A. D. 1925, duly convicted of the charge of murder in the first degree and was thereafter and on the 30th day of October, A. D. 1925, sentenced by the court to be hanged by the neck until dead, the date for said execution being set for the 8th day of January, A. D. 1925, at the penitentiary of the State of Oregon, and the Court further finding that due notice of appeal has been

served upon the County Clerk of Marion County, Oregon, and upon John H. Carson, District Attorney for said County, appealing from the judgment rendered in said matter to the Supreme Court of the State of Oregon; and if further appearing that there is reasonable grounds and probable cause for such appeal,

It is therefore ordered that the execution of the judgment in the above entitled matter be, and the same is hereby, stayed until such time as the appeal of the above entitled action is heard and disposed of in the Supreme Court of the State of Oregon.

Percy R. Kelly, Circuit Judge.

[fol. 16] In Circuit Court of Marion County, Department No. 1, October Term, 1925

[Title omitted]

Judgment Roll

Journal Entry

Law. Judgment for the State of Oregon.
Rendered and Docketed October 30, 1925.
Amount: $—.
Attorney's Fees: $—.
Costs: $—.

Remarks: Indictment for Murder in the First Degree, Defendants, Ellsworth Kelley and James Willos found guilty by Jury, as charged in the Indictment.

Judgment of Sentence: Defendants Ellsworth Kelley, and James Willos to be Hanged by the neck until Dead on Friday Jan. 8, 1926.

[fol. 17] Indictment omitted; printed side page 4 ante.

[fol. 18] IN CIRCUIT COURT OF MARION COUNTY

JOURNAL ENTRIES

Be it Remembered, That at a Regular Term of the Circuit Court of the State of Oregon, for the County of Marion begun and held at the Court House in the City of Salem in said County and State, on Monday, the 6th day of July 1925 the same being the First Monday in said month, and the time fixed by law for holding a Regular Term of said Court, when were present the Hon. Percy R. Kelly, Judge Presiding; John H. Carson, District Attorney; U. G. Boyer, Clerk; O. D. Bower, Sheriff, when, on Friday the 28th day of August, 1925, or the Twenty-eighth Judicial Day of said term, among others the following proceedings were had, to-wit:

[Title omitted]

Now, on this 28th day of August, 1925, this matter duly came on to be heard for arraignment of the defendants above named upon an indictment heretofore duly found by the Grand Jury of the above-named County, charging the above-named defendants, Tom Murray, Ellsworth Kelley and James Willos with the crime of "Murder in the First Degree," and the defendant Ellsworth Kelley having been arrested and being now in court for the purpose of arraignment and being informed that if the name by which he was indicted was not his true name he must declare his true name or be proceeded against by the name in the indictment and he, the said Ellsworth Kelley declaring at this time that the name by which he was indicted is his true name, and said defendant appearing without counsel, the said defendant, Ellsworth Kelley being informed by the court of his right to have counsel before arraignment and, if he did not have counsel and desired the aid of counsel, the court would appoint counsel and the said defendant Ellsworth Kelley thereupon informed the court that he had means to procure counsel but was not able at this time to procure counsel and being asked by the court if he desired time to procure counsel and said defendant at this time informed the court that he desired until Tuesday, Septem-
[fol. 19] ber first, 1925, to procure counsel. Whereupon

It is ordered by the court that the said defendant, Ellsworth Kelley have to and until Tuesday, September first, 1925, at ten o'clock A. M. in which time to secure counsel before proceeding further with the arraignment upon said indictment.

[Title omitted]

Now on this 28th day of August, 1925. An Indictment having been heretofore found charging the above named Defendant, Tom Murray, Ellsworth Kelley, and James Willos, with the crime of "Murder in the First Degree" and the Defendant, James Willos, having been arrested and being now in Court, for the purpose of arraignment and being informed that if the name by which he was indicted be not his true name he must declare his true name or be proceeded against in the name by which he was Indicted, and the said Defendant, James Willos at this time declaring that the name by which he was Indicted to be his true name, and the said Defendant James Willos appearing without counsel was by the Court, informed of his right to have counsel before being arraigned, and the said defendant at this time requesting the Court to appoint counsel for him, whereupon the Court appointed R. H. Bassett, to act as his counsel, and the State of Oregon appearing by John H. Carson, District Attorney for Marion County, Oregon.

Whereupon the said Defendant James Willos was duly arraigned by having said Indictment read to him in open Court and delivering to him a true copy thereof, including a list of all the witnesses endorsed on it, as well as all other endorsements thereon.

And at this time said Defendant James Willos, requesting further time in which to answer or plead to said Indictment.

It is Ordered, by the Court that the Defendant, James Willos, be and he hereby is granted to and until Tuesday, September 1st, 1925 at Ten o'clock A. M., in which to answer or plead to said indictment on file herein.

[fol. 20] Nunc pro Tunc Order

This Order hereunder having been heretofore and on the 1st day of September, 1925, made by this Court and inad-

vertently omitted from the record, It is therefore Ordered that it be entered as of then:

[Title omitted]

Now on this 1st day of September, 1925, the above entitled action duly coming on to be heard, the State of Oregon appearing by John H. Carson, District Attorney and Allan G. Carson and Lyle J. Page, Deputy District Attorneys, and the Defendant Tom Murray appearing in person and in the custody of the Sheriff of Marion County, Oregon and by Will R. King his attorney, and said defendant moves the court through his said counsel that the said Defendant Tom Murray be granted a separate Trial, now therefore:

It is Hereby Ordered by the Court that said Motion be and the same is hereby allowed; that said Defendant Tom Murray be and he is hereby granted a separate trial from that of his co-defendants said Ellsworth Kelley and James Willos; and that trial be and the same is hereby set for Monday, October 5, 1925 at 10 o'clock A. M.

[fol. 21] When, on Tuesday the 1st day of September, 1925 or the Twenty-Ninth Judicial Day of said term, among others the following proceedings were had, to-wit:

[Title omitted]

Now on this 1st day of September, 1925 comes the State of Oregon, by John H. Carson, District Attorney for Marion County, Oregon and the defendant, Ellsworth Kelley appearing in person, and by Hon. Will R. King, his attorney, he having informed the Court that he had secured the above named as his counsel herein, and this being the time fixed by the Court, for the purpose of arraignment of the said defendant Ellsworth Kelley.

Whereupon the said defendant was duly arraigned by having said indictment read to him in open Court and delivering to him a true copy thereof including a list of all the witnesses endorsed on it, as well as all other endorsements thereon, and

Now at the time the Defendant Ellsworth Kelley waiving further time in which to answer or plead to said Indictment, pleads that he is Not Guilty of the crime as charged in the Indictment on file herein.

[fol. 22] When, on Tuesday, the 1st day of September, 1925 or the Twenty ninth Judicial Day of said term, among others the following proceedings were had, to-wit:

[Title omitted]

Now on this 1st day of September, 1925, comes the State of Oregon, by John H. Carson, District Attorney of Marion County, Oregon, and the Defendant James Willos appearing in person and by Hon. Will R. King, his attorney, the said Defendant, James Willos at this time informing the Court of having secured the above named counsel in lieu of the Counsel heretofore appointed by the Court, and this being the time heretofore fixed by the Court for said Defendant, James Willos to answer said Indictment, he having hereofore been duly arraigned on said indictment, now at this time he the said Defendant James Willos, pleads that he is Not Guilty of the Crime Charged in the Indictment on file herein.

[fol. 23] When, on Thursday, the 15th day of October, 1925 or the Tenth Judicial Day of said Term, among others the following proceedings were had, to-wit:

[Title omitted]

Now on this 15th day of October, 1925, the above cause comes on for trial, The State of Oregon, appearing by John H. Carson, District Attorney and Allan G. Carson and Lyle J. Page, *District Attorneys*, Deputy District Attorneys, and the Defendants Ellsworth Kelley and James Willos, appearing in person and in charge or custody of the Sheriff of Marion County, Oregon, and Will R. King, their attorney.

The Court and counsel for the respective parties having spend the day toward the selection of a Jury.

It is Ordered, by the Court, that the above cause be continued for trial, until, Friday October 16th 1925, at nine o'clock A. M.

[fol. 24] When, on Thursday, the 16th day of October, 1925 or the Eleventh Judicial Day of said term, among others the following proceedings were had, to-wit:

[Title omitted]

Now on this 16th day of October, 1925. The above cause comes on for trial. The State of Oregon, appearing by the same counsel, as heretofore entered. The Defendants, Ellsworth Kelley and James Willos appearing in person in custody of the Sheriff of Marion County, and Will R. King, their attorney. The Court after hearing counsel for the day, toward securing a jury.

It is Ordered by the Court, that the above cause be continued until Saturday, October 17th, 1925 at nine o'clock A. M.

[fol. 25] When, on Saturday, the 17th day of October, 1925 or the Twelfth Judicial Day of said term, among others the following proceedings were had, to-wit: :

[Title omitted]

Now on this day the above cause comes, on for trial. The State of Oregon appearing by John H. Carson, District Attorney, and Allan G. Carson and Lyle J. Page, Deputy District Attorneys, and the Defendants, Ellsworth Kelley and James Willos, appearing in person and in the custody of the sheriff of Marion County, Oregon, and Hon. Will R. King, their attorney.

And a jury being called comes now, Helen H. Tate, Chas. Griggs, L. W. Durant, Alfred B. W. Hughes, James W. Bellamy, John C. McFarlane, Archie Jerman, Chas. L. Parmenter, Louise M. Hager, Thomas C. White, John W. Gamble, and Nellie B. Simpson. Twelve good and lawful persons of Marion County, who were duly empanelled and sworn, and with consent of counsel.

It is Ordered, by the Court that the Court and Jury inspect the prison before any testimony is heard by the Jury, and

Further Ordered, by the Court, that the Jury convene Monday October 19th, and inspect the prison, or so much thereof that in any way affect the issues in this cause.

It is ordered, by the Court, that this Cause be continued,

Monday, October, 19th at ten o'clock A. M.

[fol. 26] When, on Monday the 19th day of October, 1925 or the Thirteenth Judicial Day of said term, among others the following proceedings were had, to-wit:

[Title omitted]

Now on this day the above cause comes on for trial, the State of Oregon appearing by John H. Carson, District Attorney and Allan G. Carson and Lyle J. Page, Deputy District Attorneys, and the Defendants Ellsworth Kelley and James Willos appearing in person and in the custody of the Sheriff of Marion County, Oregon, and Hon. Will R. King, their Attorney.

After an inspection of the Oregon State Penitentiary by the Court and Jury, Testimony was taken on behalf of the parties hereto, and the Court and Jury after hearing the evidence adduced for the day,

It is Ordered by the Court, that this cause be continued until Tuesday, October 20, 1925 at 9 o'clock A. M.

[fol. 27] When, on Tuesday, the 20th day of October, 1925 or the Fourteenth Judicial Day of said term, among others the following proceedings were had, to-wit:

[Title omitted]

Now on this 20th day of October, 1925, the above cause comes on for trial. The State of Oregon appearing by the same counsel as heretofore entered. The Defendants Ellsworth Kelley and James Willos appearing in person, in the custody of O. D. Bower, Sheriff of Marion County, Oregon, and Hon. Will R. King, their attorney.

The Jury and Court after hearing the evidence adduced for the day by the respective parties hereto,

It is ordered, by the Court, that the above cause be continued until Wednesday, October 21st, 1925 at nine o'clock A. M.

[fol. 28] When, on Wednesday, the 21st day of October, 1925 or the Fifteenth Judicial Day of said term, among others the following proceedings were had, to-wit:

[Title omitted]

Now on the 21st day of October, 1925, the above cause comes on for trial. The State of Oregon appearing by John H. Carson, District Attorney and Allan G. Carson and Lyle J. Page, Deputy District Attorneys, and the said Defendants, Ellsworth Kelley and James Willos, appearing in person in the custody of O. D. Bower, Sheriff of Marion County, Oregon, and by Honorable Will R. King, their attorney.

The Court and jury after hearing the evidence adduced for the day. It is ordered by the Court, that the above cause be continued until Thursday, October 22nd, 1925 at nine o'clock A. M.

[fol. 29] When, on Thursday, the 22nd day of October, 1925 or the Sixteenth Judicial Day of said term, among others the following proceedings were had, to-wit:

[Title omitted]

Now on this 22nd day of October, 1925. The above cause comes on for trial. The State of Oregon, appearing by the same Counsel, as heretofore entered. The Defendants, Ellsworth Kelley and James Willos appearing in person, in the custody of O. D. Bower Sheriff of Marion County, Oregon, and the Defendants, Ellsworth Kelley and James Willos, appearing in person, in the Custody of O. D. Bower, Sheriff of Marion County, Oregon, and by Hon. Will R. King, their attorney.

The Court after hearing the evidence adduced for the day it is ordered by the Court, that the above cause be continued until Thursday, October 22, 1925, at Nine o'clock A. M.

[fol. 30] When on Friday, the 23rd day of October, 1925 or the Seventeenth Judicial Day of said term, among others the following proceedings were had, to-wit:

[Title omitted]

Now on this 23rd day of October, 1925. The above cause comes on for trial. The State of Oregon, appearing by John H. Carson, District Attorney and Allan G. Carson and Lyle J. Page, Deputy District Attorneys, and the defendants Ellsworth Kelley and James Willos, appearing in person, in custody of O. D. Bower, Sheriff of Marion County, Oregon, and by Hon. Will R. King, their attorney.

The Court after hearing the evidence adduced, and the argument of counsel for the day.

It Is Ordered that the above cause be continued until Saturday, October 24th, 1925 at nine o'clock A. M.

[fol. 31] When, on Saturday, the 24th day of October, 1925, or the Eighteenth Judicial Day of Said term, among others the following proceedings were had, to-wit:

[Title omitted]

Now on this 24th day of November, 1925 the above cause comes on in continuation of yesterday's proceedings. The State of Oregon appearing by John H. Carson, District Attorney and Allan G. Carson and Lyle J. Page, Deputy District Attorneys and the Defendants, Ellsworth Kelley and James Willos, appearing in person in custody of O. D. Bower, Sheriff of Marion County, Oregon, and by Hon. Will R. King, Attorney for said Defendants.

The Jury after hearing the argument of counsel, and were duly instructed and charged by the Court, and in charge of sworn officers of the Court retired to consider their verdict; No verdict was rendeerd on this date.

[fol. 32] In Circuit Court of Marion County

[Title omitted]

Verdict and Order Discharging Jury—October 26, 1925

Now on this 26th day of October, 1925. The above causes comes on for further consideration of the Court and Jury. The State of Oregon appearing by John H. Carson, Dis-

trict Attorney, and Allan G. Carson and Lyle J. Page, Deputy District Attorneys, and the Defendants, Ellsworth Kelley and James Willos, appearing in person in the custody of O. D. Bower Sheriff of Marion County, Oregon, and Honorable Will R. King, their attorney.

The Jury after due consideration of the cause *cause* returned into Court the following verdict to-wit:

IN THE CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MARION

THE STATE OF OREGON, Plaintiff,

vs.

TOM MURRAY, ELLSWORTH KELLEY, and JAMES WILLOS, Defendants

We, the Jury, in the above entitled criminal action, find [fol. 33] the above named Defendants, Ellsworth Kelley, and James Willos, guilty as charged in the Indictment on file herein.

A. B. W. Hughes, Foreman; Louise M. Hager, Helen H. Tate, Nellie B. Simpson, L. W. Durant, D. L. Parmenter, A. M. Jerman, C. R. Griggs, Thomas C. White, John C. McFarlane, J. W. Bellamy, J. W. Gamble.

and the jury assenting thereto they were thereupon discharged by the Court from further consideration of the above cause, and their verdict filed.

It is Further Ordered, by the Court, that Friday, October 30th., 1925 at nine o'clock A. M. be and the same is hereby fixed as the time for Imposition of Sentence, in the above entitled cause upon the said defendants, Ellsworth Kelley and James Willos.

[fol. 34] IN CIRCUIT COURT OF MARION COUNTY

[Title omitted]

JUDGMENT AND SENTENCE AS TO DEFENDANT KELLY—October 30, 1925

Now, on this day, this cause came on for final hearing, the State of Oregon appearing by John H. Carson, District Attorney, and Lyle J. Page and Allan G. Carson, Deputy District Attorneys, the defendant Ellsworth Kelley appearing in person in custody of the Sheriff of Marion County, Oregon, as well as by Honorable Will R. King, of counsel for defendant Ellsworth Kelley; and it appearing to the court that the defendant Ellsworth Kelley has heretofore been duly indicted, arraigned, tried and convicted of the crime of murder in the first degree upon his plea of not guilty; and it appearing to the court that two days have elapsed since said verdict was rendered and that now is the proper time to pass sentence and judgment of the court upon said verdict, and no motions having been allowed in arrest of judgment or for a new trial, and that the time heretofore fixed by the Court for the passing of sentence and judgment on said verdict has arrived, and the defendant, Ellsworth Kelley having been asked if he had anything to say why sentence should not be passed upon him at this time, and the defendant Ellsworth Kelley having made a Statement to the Court showing no good cause why sentence should not now be passed, and the court being fully advised in the premises.

Now, therefore, it is the judgment of this court that the defendant Ellsworth Kelley be punished by death in the manner provided by law.

[fol. 35] That on Friday, the eighth day of January, A. D. 1926 at the Penitentiary of the State of Oregon, he be hanged by his neck until he is dead.

It is further ordered that within twenty days from this date the Sheriff of Marion County, Oregon, deliver said defendant Ellsworth Kelley to the Warden of the Penitentiary of the State of Oregon, for the execution of this sentence.

[fol. 36] In Circuit Court of Marion County

[Title omitted]

Judgment and Sentence as to Defendant Willos—October 30, 1925

Now, on this day, this cause came on for final hearing, the State of Oregon appearing by John H. Carson, District Attorney, and Lyle J. Page and Allan G. Carson, Deputy District Attorney-, the defendant James Willos appearing in person in custody of the Sheriff of Marion County, Oregon, as well as by Honorable Will R. King, of counsel for defendant James Willos; and it appearing to the court that the defendant James Willos has heretofore been duly indicted, arraigned, tried and convicted of the crime of murder in the first degree upon his plea of not guilty; and it appearing to the court that two days have elapsed since said verdict was rendered, and that now is the proper time to pass sentence and judgment of the court upon said verdict, and no motions having been allowed in arrest of judgment or for a new trial, and that the time heretofore fixed by the court for the passing of sentence and judgment on said verdict has arrived, and the defendant James Willos having been asked if he had anything to say why sentence should not be passed upon him at this time, and the defendant James Wilos having made a statement to the court showing no good cause why sentence should not now be passed, and the court being fully advised in the premises.

[fol. 37] Now, therefore, it is the judgment of this court that the defendant James Willos be punished by death in the manner provided by law.

That on Friday, the eighth day of January, A. D. 1926 at the Penitentiary of the State of Oregon, he be hanged by his neck until he is dead.

It is further ordered that within twenty days from this date the Sheriff of Marion County, Oregon, deliver said defendant James Willos to the Warden of the Penitentiary of the State of Oregon, for the execution of this sentence.

[fol. 38] IN CIRCUIT COURT OF MARION COUNTY

[Title omitted]

ORDER ENLARGING TIME TO FILE BILL OF EXCEPTIONS—November 3, 1925

The above matter coming on for hearing on motion of Will R. King, Attorney for the above named defendant, Ellsworth Kelley and James Willos, praying an order extending time for the filing of the Bill of Exceptions herein, and it appearing to the Court that the testimony in said cause is voluminous, and that it will be impossible for the court reporter to extend the notes taken at the trial and to transcribe the testimony therein before on or about the 26th day of December, 1925, and that it is necessary that said notes be transcribed before a bill of exceptions can be prepared and filed herein.

It is therefore ordered that the defendants Ellsworth Kelley and James Willos be and are hereby allowed to and including the 26th day of December, 1925, in which to prepare and tender to the Court for signing and for file herein, a bill of exceptions in the above entitled action.

[fol. 39] IN CIRCUIT COURT OF MARION COUNTY

[Title omitted]

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL

The above matter coming on before the Court upon the motion of defendants Ellsworth Kelley and James Willos, by their attorney Will R. King, for an order extending the time for filing the transcript on appeal to the Supreme Court of the State of Oregon in the said Supreme Court of the State of Oregon, and it appearing to the Court that it will be impossible to prepare and tender for signing a bill of exceptions in said matter on behalf of the two said defendants within the time allowed by law for the filing of such transcript without an extension of time for such filing, and that it is necessary that such extension be granted,

It is therefore ordered that the defendants Ellsworth

Kelley and James Willos and each of them be and they are hereby granted an extension of the time for the filing of the transcript on appeal to the Supreme Court of the State of Oregon to and including the second day of January, A. D. 1926.

[fol. 40] In Circuit Court of Marion County

[Title omitted]

Order Overruling Motion in Arrest of Judgment—December 31, 1925

Now on this thirty first day of December, A. D. 1925; the above entitled action duly coming on for hearing upon the motion of defendants Ellsworth Kelley and James Willos for an arrest of Judgment herein, the Plaintiff appearing by John H. Carson, District Attorney for the County aforesaid and said last named Defendants Ellsworth Kelley and James Willos appearing by Will R. King, Esq., their Attorney and said Defendants by their said counsel having waived argument upon said motion, and the Court deeming said motion ill-timed and not well taken, now therefore,

It is hereby ordered, by the Court that said motion be, and the same is hereby, overruled and denied.

[fol. 41] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 42] In Circuit Court of Marion County

[Title omitted]

Bill of Exceptions—Filed in Supreme Court April 9, 1926

Caption

Be it remembered, that at a regular term of the Circuit Court of the State of Oregon in and for the County of Marion, duly held at the City of Salem in said Marion

County, Oregon, on the 15th day of October, A. D. 1925, there being present the Honorable Percy R. Kelly, judge presiding, John H. Carson, District Attorney for Marion County, Oregon, U. G. Boyer, County Clerk of Marion County, Oregon, and ex-officio clerk of the above-entitled court, and O. D. Bower, Sheriff of Marion County, Oregon, the defendants, Ellsworth Kelley and James Willos having heretofore been duly indicted by the grand jury of said Marion County, Oregon, upon a charge of murder in the first degree, and having been duly arraigned upon said indictment and having duly entered their plea of not guilty thereto, and the matter of the trial of the said Ellsworth Kelley and the said James Willos upon such indictment and said plea thereto duly coming on for hearing before said Court, said plaintiff appearing by John H. Carson, District Attorney of Marion County, Oregon, and Lyle J. Page and Allan G. Carson, Deputies District Attorney of said Marion County, Oregon, and the defendants appearing in person and by Will R. King, their attorney, a jury having been duly and regularly drawn, impaneled and sworn to by the said Ellsworth Kelly and the said James Willos on such indictment, the following proceedings were, among others had in said matter, to-wit:

[fol. 43] Exception Number One

Dr. Carlton Smith was called as a witness on behalf of the State of Oregon, and after being duly sworn, was interrogated by John H. Carson, District Attorney, and in answer to some of such interrogatories gave, among other, the following answers:

"Q. Through the kindness of the bailiff I hand you a bullet in an envelope, Doctor, please examine that bullet and state whether or not you recognize it?

A. Yes, this is the bullet——

Q. State whether or not that is the bullet you took from the head of John Sweeney, deceased, on the occasion you refer to?

A. Yes, this is the bullet we took from the head of John Sweeney.

Q. State whether or not that is the bullet which caused the wound in the head of John Sweeney, which you have described?

A. Yes, this is the bullet that caused the wound just described.

Q. And Doctor, what have you to say as to the condition of the bullet now with reference to the condition of it at the time you extracted it, or took it from the head of John Sweeney, deceased?

A. It is in the same condition.

Q. What would you say, Doctor, as to whether or not the wound caused by the bullet which you hold in your hand would produce instantaneous death, or otherwise?

A. This would produce instantaneous death, lodged where it was.

Q. State whether or not it is likely a person suffering from the wound you described would move any considerable distance after having been wounded as related?

A. No, a party wounded as Mr. Sweeney was would not move any distance at all.

Mr. Carson: We offer that bullet, if the Court please.

The Court: Submit it to Judge King."

Whereupon, defendants be their counsel, Will R. King, objected upon the grounds of incompetency, and not binding upon these defendants, whereupon the Court overruled said objection and in an exception was thereto allowed. [fol. 44] The Court thereupon permitted said exhibit to be offered in evidence and said exhibit was received in evidence and marked "State's Exhibit Number 10," which said exhibit is attached to this Bill of Exceptions, marked as "State's Exhibit Number 10" and by reference made a part of this exception.

Exception Number Two

Dr. G. E. Prime, a witness called on behalf of the State of Oregon, after being duly sworn, was interrogated by John H. Carson, District Attorney, and in answer to some of such interrogatories, among others, gave the following answers:

"Q. What other wounds did you find on the body of James Milton Holman?

A. I found a wound on the right elbow, one gun-shot wound on the left leg about midway between the ankle and the knee and apparently a knife wound on the right foot on the inner side about one inch back of the joint of the great toe."

Whereupon, Will R. King, attorney for defendants moved to strike out the opinion of the witness as being "apparently a knife wound" unless he states what the nature of the wound was, which motion to strike was overruled by the Court and an exception duly allowed.

Exception Number Three

J. S. Murry, was called as a witness on behalf of the State of Oregon, and after being duly sworn and having testified at length relative thereto, John H. Carson, District Attorney, made the following offer of evidence:

"Mr. Carson: If the Court please, we offer certified copy of the judgment in the case of State of Oregon versus Tom Murray, John Doe (true name Eddie Walker) and Richard Roe, filed, certified and endorsed by R. S. Bryson, County Clerk.

The Court: Submit the same to Judge King."

Whereupon, the defendants' counsel, will R. King, objected on the ground same is incompetent, irrelevant and immaterial, which objection was overruled by the Court, and an exception allowed. The Court thereupon permitted the said exhibit to be received in evidence and marked "State's Exhibit Number 13" which said exhibit is attached to this Bill of Exceptions marked as Exhibit Number 13, and by reference made a part of this exception.

[fol. 45] Exception Number Four

Said J. S. Murray, a witness called on behalf of the State of Oregon, being interrogated by John H. Carson, among other things,, testified that he was clerk and book-keeper at the Oregon State Penitentiary, and as such in charge of, and had in his custody, all the records of said penitentiary.

He was further interrogated by the District Attorney, and, in answer to some of such further interrogations, gave the following answers:

"Q. I will ask you to state by virtue of what authority the defendant, Tom Murray, was detained in the Oregon State Penitentiary?

A. Why a commitment which came with him.

Q. How many commitments came with him?

A. Two, it was on two different sentences.

Q. I hand you two documents, I will ask you to examine them and state whether or not they are the commitments you refer to?

A. They are.

* * * * * * *

Q. State whether or not the defendant Tom Murray was detained and is detained at the Oregon State Penitentiary by virtue of those commitments which you hold in your hand?

A. He is and was.

* * * * * * *

Q. We offer those commitments, if the Court please."

Whereupon, the defendants, through their attorney, Will R. King, objected as incompetent, irrelevant and immaterial, and for the further reason the commitments are void for uncertainty, without sufficient definiteness as to when one sentence will end and the other begin. Which objection was overruled by the Court, and an exception duly saved thereto. The Court thereupon permitted said exhibits to be offered in evidence and said exhibits were received in evidence and marked "State's Exhibits Numbers 15 and 16", the original of State's Exhibit 15, being hereto attached and made a part hereof; the original of said exhibit "State's Exhibit Number 16" being attached to and made a part of the Bill of Exceptions in the case of State of Ore-[fol. 46] gon versus Tom Murray, now pending in the Supreme Court of the State of Oregon, a copy of said exhibit "16" is hereto attached and made a part hereto.

Exception Number Five

The said J. S. MURRAY, a witness called on behalf of the State of Oregon, being further interrogated by John H. Carson, District Attorney, gave among others, the following answers to some of such further interrogatories, towit:

"Q. Now are you acquainted with the defendant, James Willos?

A. Well, I know him by sight, is all. When he first came in I took his finger prints and description is all.

Q. Do you know whether he has been a prisoner at the Oregon State Penitentiary?

A. He has.

* * * * * * *

Q. Could you refer to your commitment in that cause and state the date upon which he was received?

A. Yes, (witness refers to papers) April 13, 1924.

Q. The date he was received at the Oregon State Penitentiary as a prisoner and convict?

A. Yes.

Q. By virtue of what authority has he been a prisoner and convict at the Oregon State Penitentiary since that time?

A. By virtue of that commitment.

Mr. Carson: We offer that commitment.

Whereupon, Will R. King, counsel for defendants, objected on the ground of incompetency, which objection was overruled by the Court and an exception allowed. The Court thereupon permitted the said exhibit to be offered in evidence, and said exhibit was received in evidence and marked "State's Exhibit Number 17"; copy of which said State's Exhibit 17 is hereto attached and made a part hereof, the original of said exhibit being attached to and made a part of the Bill of Exceptions in the case of State of Oregon versus Tom Murray, now pending in the Supreme Court of the State of Oregon.

[fol. 47] Exception Number Six

A. M. Dalrymple, a witness called on behalf of the State of Oregon, being duly sworn, was interrogated by the District Attorney, John H. Carson, and gave, among other, the following answers to some of such interrogatories:

"Q. What did you do with the leaves, upon which appeared some writing?

A. I tore them out of the book before I turned the note book over to his brother, and later gave them to the district attorney.

Q. These in court here?

A. Yes.

Q. I will hand you some leaves taken from a book and ask you to state whether or not those bear the writing you refer to?

A. These are the leaves. This is the handwriting I refer to, and these are the leaves I tore from the diary.

Q. And whose handwriting would you say those were?

A. I would say this was Oregon Jones' handwriting.

Q. Bert Oregon Jones, convict, mentioned in this commitment in evidence?

A. Bert Oregon Jones.

Mr. Carson: We offer them.

Whereupon, the defendants, through their counsel, objected to the offer as incompetent and immaterial, and not having been properly identified, it appearing this was handed to the witness by another party who has not been called as a witness for the identification of the purported writing. Whereupon, the Court permitted the said exhibit to be offered in evidence, overruling the objection and duly allowing an exception, and the said exhibit was received in evidence and marked "State's Exhibit Number 21" (consisting of seven sheets), a copy of which said Exhibit Number 21 is hereto attached and made a part hereof, the original of said exhibit being attached to and made a part of the Bill of Exceptions in the case of the State of Oregon versus Tom Murray, now pending in the Supreme Court of the State of Oregon.

[fol. 48] Exception Number Seven

The said A. M. DALRYMPLE, a witness called on behalf of the State of Oregon, after being duly sworn, was interrogated further at length by John H. Carson, District Attorney, and was further interrogated on cross examination by Will R. King, counsel for the defendants, during which, among others, he answered the following interrogatories, as follows:

"Q. And you got those from this trusty, Clarence Johnson?

A. Yes.

Q. And all you know about where he got them is what he told you?

A. He told me.

Whereupon, Will R. King, attorney for defendants, moved the Court to strike from the record the testimony in reference to the said exhibit Number 21 referred to in the foregoing Exception Number Six, on the grounds that the said exhibit was not properly identified; which motion was overruled by the Court, and an exception allowed.

Exception Number Eight

JAMES R. CAREY, a witness called on behalf of the State of Oregon, being duly sworn, was interrogated by John H. Carson, District Attorney, and in answer to some of such interrogatories gave, among others, the following answers:

"Q. Do you recall the day these defendants, Willos and Kelley were returned to the Oregon State Penitentiary after their escape?

A. I remember them returning, I couldn't say just what date it was.

Q. Approximately how long was it after they had escaped?

A. About ten days, I think.

Q. Did you have occasion to talk with them after they returned?

A. Yes, sir.

Q. Particularly with the defendant Kelley?

A. Yes, sir.

Q. Did you have any conversation with him regarding the plans they had as to the break?

A. Yes.

[fol. 49] Q. Do you recall when you had that conversation?

A. Yes.

Q. When was it?

A. Just after they were put in their cells.

Q. On their return?

A. Yes, sir.

Q. What, if anything, did the defendant Kelley tell you about their plans?

A. He told me what they had planned to do.

Q. What did he say?

A. He told me their plan was to take the arsenal and whatever guards were available and either go through Tower Number 1 or the front gate, and use the guards as shields.

Q. Say anything about shooting?

A. I asked him if they planned for to do any shooting, and he said "no."

Mr. King: Let me ask a question. How did he come to tell you this?

A. I asked him.

Q. Did you tell him it was not necessary for him to answer unless he wanted to?

A. No, sir."

Whereupon, Will R. King, attorney for defendants, objected to this line of testimony for the reason that a prisoner should first be informed that it is not necessary for him to make a statement unless he sees fit to do so; which objection was overruled by the Court, who stated that this was not required but that it would have been different if there was any evidence of any duress or any threats made or offers of reward, but that prima facie there was no such showing, and an exception was allowed.

[fol. 50] **Exception Number Nine**

The said witness, JAMES R. CAREY, called on behalf of the State of Oregon, being further interrogated by John H. Carson, District Attorney, gave, among others, the following answers to some of such further interrogations, to-wit:

"Q. Did you examine the cell at any time within thirty days immediately preceding the prison break?

A. Yes.

Q. Did you observe the same wall upon which you found this writing?

A. Yes, sir.

Q. Was the writing there during the time you examined the cell?

A. I never saw it.

Q. Well, would you have any difficulty in seeing it—did you have any difficulty in seeing it when you did go look at it?

A. No, sir.

Q. What would you say, whether it was there on the former occasion——"

To this question, counsel for defendants, Will R. King, objected as incompetent, which objection was overruled by the Court and an exception allowed. The witness continued as follows:

"A. I don't think it was there.

Q. Are you familiar with the handwriting of Ellsworth Kelley; have you ever seen him write?

A. Yes, I have read his letters when he writes them.

* * * * * * *

Q. Is it necessary for someone in authority at the penitentiary to read all letters written by prisoners?

A. Yes.

Q. That go to the outside, I take it?

A. Yes.

Q. A sort of censor arrangements.

[fol. 51] A. Yes, sir.

Q. Well, during the time you have been there have you had occasion to read letters written by the defendant Kelley?

A. Yes.

Q. Did you observe his handwriting and become familiar with it?

A. Well, I recognize his handwriting when I see it.

Q. The letters you read in your censoring of the mail that left the penitentiary as coming from the defendant Kelley, did you know they came from Kelley?

A. Well, if it wasn't for his name on it I couldn't swear it was his mail.

Thereupon counsel for defendants, Will R. King, objected "unless the writing is exhibited in evidence for our inspection." Which objection was overruled by the Court and an exception allowed. The witness continued as follows:

"Q. Would you say you are familiar with the handwriting of the defendant Ellsworth Kelley?

A. Yes, sir.

Q. From your familiarity with the handwriting of this defendant, what would you say as to whether or not the writing you saw on the cell wall of the defendant Ellsworth Kelley was the handwriting of defendant Ellsworth Kelley?"

Thereupon, defendants' counsel, Will R. King, objected as incompetent and immaterial, which objection was overruled by the Court and an exception saved.

"A. Well, I recognized the handwriting as Kelley's writing.

Q. Now, what was that writing?

Thereupon, defendants' counsel objected as incompetent, which objection was overruled by the Court and an exception allowed.

[fol. 52] The witness continued:

"A. On August 12th, I leave this cell dead or alive. Ellsworth Crowbar Kelley."

Defendants' counsel objected as incompetent, irrelevant and immaterial and moved to strike the answer as not sufficient to constitute a confession or admission on the part of either of the defendants, which objection and motion were overruled by the Court, and an exception allowed.

Exception Number Ten

C. L. NEWMAN, a witness called on behalf of the State of Oregon, and duly sworn, was interrogated by John H. Carson, District Attorney, and gave, among others, the following answers to the following interrogations, among others, to-wit:

"Q. I will hand you several pages bearing handwriting, and ask you whether or not you recognize it?

A. Yes, that is the statement.

Q. Whose handwriting is that statement?

A. Mine.

Q. Notice the last page as arranged there now, Mr. Newman, and state whose signatures those are on there?

A. Tom Murray, James Willos and Ellsworth Kelley.

Q. The James Willos, whose name appears on this statement, is the defendant here?

A. Yes.

Q And the Ellsworth Kelley, whose name appears on the statement, is this Ellsworth Kelley, defendant in this case?

A. Yes, sir.

Q. That statement was made August 17th, 1925, at your place near New Era?

A. Yes.

Q. I notice to the left of each signature, sort of a blot, what is that?

A. That is their finger print.

[fol. 53] Q. Did they each place their finger print- or thumb——

A. It is the thumb, I think.

Q. Opposite their signature?

A. Yes, sir.

Mr. Carson: Now we offer that, if the Court please.

Whereupon, Will R. King, defendants' counsel, interposed the objection of incompetency, which objection was overruled by the Court, and an exception saved; said exhibit was thereupon received in evidence and marked "State's Exhibit Number 25" which said exhibit is attached to this Bill of Exceptions, marked Exhibit Number 25, and by reference made a part of this exception.

Exception Number Eleven

BLANCHE F. BARRETT being called as a witness on behalf of the State of Oregon, and duly sworn, was interrogated by John H. Carson, District Attorney, and in said interrogation, among others, gave the following answers to the following questions, among others, to-wit:

"Q. You are the duly appointed, qualified and acting court reporter of this district?

A. Yes, sir.

Q. At our request, or or about the 25th day of August, 1925, did you attend at the Oregon State Penitentiary for the purpose of taking stenographically the statements of these defendants, Ellsworth Kelley and James Willos, together with the statement of the defendant, Tom Murray?

A. Yes.

* * * * * * *

Q. Do you recall at that time and place, being the parole office of the Oregon State Penitentiary, Salem, Oregon, having seen the defendant, Ellsworth Kelley?

A. Yes, sir.

Q. Did you hear a conversation between Ellsworth Kelley and myself and others?

A. I did.

Q. Did you report stenographically those conversations?

A I did.

* * * * * * *

Q. State whether or not the transcript you made is a cor- [fol. 54] rect transcript of your notes taken at the time of the conversation?

A. It is.

Whereupon, the defendants through their counsel, Will R. King, objected as incompetent, and for the further reason it is not disclosed the statement was made without duress or without offer of reward or that they were made voluntarily, and that if the witness has any knowledge independent of her notes she must state orally what was said.

"Mr. Carson: Do you recall the conversation had between ourselves and Ellsworth Kelley?

A. Not independent of my notes, Mr. Carson.

Q. By referring to your notes could you correctly restate the conversation as it was had?

A. I could.

Q. Then will you please get your notes with the consent of the Court?"

Whereupon, the witness returning to the court room with the shorthand notes above referred to, the jury was dismissed from the court room, and the witness read from her shorthand notes the above-referred-to statement of the defendant Kelley, and also statement of the defendant Willos, after being interrogated by the District Attorney along the same line as to defendant Willos as previously set forth as to defendant Kelley, which statements are as follows:

"Statement of Ellsworth Kelley

Questions by Mr. Carson:

Q. Your name is Ellsworth Kelley?

A. Yes, sir, it is.

Q. Will you go ahead, Kelley, and tell us your side of this escape you were in?

A. Everything in detail, or just my side of it?

Q. Well, now, whichever way you want it.

A. You mean my actual part in the break?

Q. Yes.

[fol. 55] A. Well, I was the third one off the roof, and when I came down and landed, there was a guard at Number 1, and Number 7, with their rifles on me. I threw my hands up, and Willos followed me down, which he was the last. He done likewise, and by that time there was quite a commotion going on in the turnkey's office, Willos and I were standing there with our hands in the air, and someone was hollering for them to shoot. Pete White, this little guard, stood there by us and he argued with them not shoot while we were standing with our hands in the air, and I think that he was the one that kept—that was the cause of them not shooting at that time. Immediately afterwards Murray and Jones came out of the turnkey's office with guns, and they all—the guards, seemed to scatter different places to conceal themselves, and there was a general shooting, going on, on both sides. When the first man went through the tower, why—I followed after. One of them throwed Willos

a pistol, and he followed and then maybe fifty feet after they went, I started. There was shooting all the time in the yard, and the only idea I had at the time was try and *try and* get away, which I did. I went through the tower after they went through, and seen Jones down on the ground against the wall, he seemed to be shooting all over the grounds, he kind of lost his head I guess, he shot his last shot at Holman, I guess it was, who was on the ground at the time, and he says "this is my last shot" and throwed the gun down. I picked it up myself and started around the wall over toward the asylum. We got over to the asylum and captured that car, and from then on there was a chase, which I guess everybody knows. We was in the vicinity of three or four miles of Silverton for about three days, and gradually circled around east and a bit north.

Q. Were you the last one of the four through the tower?

A. The last one.

Q. And you had a shot gun, did you not?

A. After I was down on the ground, yes, I picked up the empty gun. It had no shells in it.

[fol. 56] Q. Did you carry that shot gun with you from then on?

A. I carried it with me the first night. I put it under a log about a mile away from where we got out of the car, out near the school house near Pratum.

Q. Did you examine the gun carefully to see whether there were any marks on it?

A. No, I just knew it was a pump gun, was all.

Q. You picked that up on the ground, or in the tower, which?

A. No, I picked it up on the ground after Jones throwed it down. He shot the last shot himself, he was already shot in the side himself, and the last I seen of him he was sitting against the wall.

Q. Who cut the hole in the roof?

A. Willos and myself.

Q. When did you do that?

A. That same afternoon, as the boys were bringing the commissaries to their cells, they were running back and forth, that was when we were watching our chance to do the job.

Q. How long did it take you?

A. I should judge about a couple of hours.

Q. Where did you get the brace and bit, or the augur?

A. I got the brace and bit myself, it was one that was out by the old incinerator, they used to keep it out there, I swiped it myself, they had it in a little box out there.

Q. Where did you put it after you used it?

A. We used it and le-t it up there.

Q. Between the ceiling and the roof?

A. The top of the roof, yes.

Q. When did you tell Jones and Murray you had cut the hole?

A. Well, they already knew, they knew we was going to cut it.

Q. How long had you four been discussing the break?

A. Well, we had been discussing part of it—for a considerable time. We didn't figure on the shooting end of it.

Q. Well, except for the shooting, did you figure it out just as you did it?

[fol. 57] A. Except for the shooting—we figured we was going out the front gate, that was our intention, to go out the front gate.

Q. Well, you decided in discussing and planning it, to make for the arsenal, didn't you?

A. Well, someone discussed that, they thought that would just take care of itself, if they had to take a chance, to take a couple of men in the office, to make them go ahead out the front gate, otherwise, try to get in the arsenal. None of us knew for sure whether there were any loaded guns in the arsenal, it was kind of speculation on our part.

Q. But you all must have figured there was at least one gun or more in the arsenal?

A. Well the only thing we might have figured on was a pistol being on the desk, which wasn't there, and that is the only thing we actually figured on, was the pistol, which wasn't there.

Q. Where did Murray get the knife he had?

A. I couldn't say where he did. I didn't ask him.

Q. You saw it, the knife he had?

A. A kind of paring knife? Yes, but I don't know where he did get that. Most of the boys carried knives around. I didn't ask him where he got it.

Q. You were celling with Jones?

A. Yes, celling with Jones.

Q. Do you remember when Jones came out of the turnkey's office and hollered "Come and get your guns" to you and Willos, or some such expression?

A. Yes, something of that sort, I do remember, I didn't know whether it was him or Murray, which one of them.

Q. But one of them hollered to you and Willos, to come and get your guns?

A. Yes, sir.

Q. But you didn't go?

A. No, sir.

Q. You were inside the main office building for a minute, were you not?

A. No, sir. I didn't go in any part of the building. I was outside. I was inside the fence.

[fol. 58] Q. Were you under the steps to the warden's or turnkey's office?

A. No, just out on the sidewalk.

Q. Did you run over behind the oak tree on the north side of the yard?

A. Yes, after they started shooting, we jumped around the trees and flowers, they trees are all around there.

Q. Did you see Murray behind that oak tree shooting?

A. Yes, sir.

Q. What kind of a gun was he using, do you know?

A. I am not sure. I know it was some kind of a pistol.

Q. The same one he carried away with him?

A. I believe it was.

Q. At the time you first came out, how many guards were there in Post 1?

A. Well, I didn't take notice, I know there was one, but I didn't take notice there was any more than that. I know there was one throwed his gun on me as well as the man in Number 7.

Q. Did you see Murray shoot Sweeney?

A. I seen him shooting up in the tower. I never seen Sweeney fall. Someone says "I hit him" or "I got him," either Murray or Jones.

Q. You didn't know which one it was?

A. No, not for certain. At that time I was excited and I didn't know what they were doing?

Q. Which one of the four shot Holman?

A. Jones. I seen him myself, as he shot him. He shot him with the shot gun. He was down on the ground when he shot him. Holman was sitting down, I don't know whether he had been shot before or not. I believe that was the one, Sweeney was the one in the tower, wasn't he?

Q. Yes, did you notice Sweeney? In the tower as you ran through?

A. Yes, I noticed just the way he was sitting on the floor.

Q. Where was he?

A. On this side of the tower. (Indicating.)

Q. Which side would that be?

A. That would be toward the inside of the yard. He [fol. 59] was sitting kind of up in the corner and there was a stream of blood running down this side of his face.

Q. The right side?

A. Yes, sir.

Q. Did you see anybody else in the tower?

A. No, there wasn't anybody in the tower outside of him.

Q. Who was the first one in tower 1?

A. Jones, or Murray, I am not certain which one, they both were together, I have forgotten which stepped ahead of the other, they both were together.

Mr. Page: How long before the break did Murray have this knife?

A. I don't know just how long. He had mentioned several days before that he had a knife that he kept over in the boiler room. I don't know just how long it was exactly.

Q. Had he figured on using this knife at the time of the break?

A. Well, I think he figured on holding the man up in the office with it in going out the front gate.

By Mr. Carson:

Q. Jones had a knife too, didn't he?

A. Yes, sir.

Mr. Page: Was the shot gun the only gun you had?

A. Yes, that was the only gun I had.

Mr. Page: That was the ones that Jones carried?

A. That is the one Jones brought out of the arsenal, yes, sir.

Mr. Carson: You said you put it under a log?

A. Yes, sir.

Mr. Carson: About a mile away from the place——

A. About. There was a open field, and up the side of the mountain, it might have been a little over half a mile from the place where we abandoned the car by the school house.

Q. Do you remember after leaving the taxi-man and the attendant that you got over at the asylum, after you had gone a short time some dogs were barking?

A. I believe I do, it seems I heard them.

Q. And how far away were the dogs barking from the [fol. 60] place where you were or had left the taxi-driver?

A. Well, we judged about a mile, it sounded to us pretty near a mile.

Q. Do you know which direction you went after you left the taxi driver?

A. Well, we made a big circle to the left and came back north out toward Silverton, we went through some open country, across a piece of timber and mountains, we were in the vicinity of Silverton two or three days, three or four miles east of there all the time.

Q. East of Silverton?

A. Yes, and mostly north, too. The posses were a little south of us all the time, they were looking in the southeastern part and we were northeast of Silverton.

Mr. Page: Do you know where Jones was when the three of you were behind the oak? Before you went through the tower.

A. I believe he was there too, close to that, right around that tree.

Q. Who was doing the shooting from the oak tree?

A. Well, Jones was the only one I took particular notice of, he was doing most of the shooting. I seen Murray shooting this pistol, he seemed to be shooting with his left hand around the tree, I wasn't watching him. I tried to watch every direction myself.

Mr. Page: You went up the steps the last, did you not?

A. Yes, I was quite a ways back, when I got down on the ground they were clear out of sight around Number 2 tower.

Q. Did you stay behind the oak tree until the rest went through the tower?

A. I didn't go over to the oak tree as soon as they did, by the time I got over there, they had started up into the tower.

Q. Started on?

A. Yes, sir.

Q. Was Jones ahead of you at this time.

A. Oh yes, all of them were ahead of me.

Q. When you went up the stairs?

A. Yes.

Q. And Jones was ahead?

A. Yes, I was standing right over him on the wall, I was going to jump down from the wall, when he said they [fol. 61] had hit him, then he shot Holman and throwed the gun down.

Q. Where was Jones when he got hit?

A. At the foot of Number 1 tower, on the ground outside of the wall, just around the corner.

Q. In which direction was he shooting?

A. Back this direction?

Q. West?

A. Yes, somewhere between the garage and the guard's quarters, shooting at somebody.

Q. Was he shooting with the shot-gun then?

A. Yes, sir.

Q. There was another shot-gun there, wasn't there?

A. I didn't notice.

Q. You didn't see a shot-gun in the tower as you went through?

A. No, I noticed several guns in the tower, but I didn't notice whether they were rifles or shot-guns, I didn't pay that much attention to it.

Mr. Carson:

Q. If that gun were empty, why did you take it, Kelley?

A. Well, in case I run into somebody, I was so far behind the rest of them, I thought it would stand me in hand getting away from them, I had to go past Number 2; when

I got down there wasn't nobody in sight, or nobody in Number 2.

Q. The gun was empty?

A. Yes, sir.

Q. An empty gun wouldn't do you any good?

A. I didn't know, I thought it might help a little bit, the looks of it.

Q. Why didn't you pick up one of the guns in the tower?

A. I didn't think, I didn't think, all I wanted to do was get away, I didn't want to do any shooting, I was trying to get way, and that was all I was thinking about at the time.

Q. Did you change your mind when you picked up the gun down below?

A. Jones said I better take the gun, I might run into somebody going around the wall, and I took it.

Mr. Page:

Q. How long had you figured on making the break [fol. 62] through the roof?

A. Well, we discussed it off and on several months but we hadn't decided on the exact method of doing it.

Q. Had you decided—how long prior to the time you got the hole made, on that particular day?

A. Yes, whenever—we had agreed to do it on commissary day, when the fellows were taking groceries up and back and forth.

Q. You didn't have a knife?

A. No.

Q. You thought there was a gun in the turnkey's office on the desk?

A. They thought there was one in the turnkey's office on the desk, yes.

Q. Is that why Murray and Jones went immediately to the turnkey's office when they got down?

A. That is why Jones went to the desk. He went to the desk, but they were figuring on making the turnkey go ahead and go out the front gate. They thought it was a long shot, they didn't know whether it would work or not, but that is the way we had it figured in the first place.

Q. You must have figured it was necessary to get a gun to do that?

A. That was all just kind of speculation about the gun proposition, Jones, he wanted to get the guns, and I had been arguing against it myself right from the start. I knew we couldn't get away with a thing like that.

Mr. Carson: They finally then overruled your objection?
A. Yes.
Q. And decided to get the guns anyway?
A. Yes, sir.

Q. Mr. Bower: How far did you walk with the jitney driver after you left the car?
A. About a third of a mile, not more than that.
Q. How long were you there before you left them finally?
A. Until dark.
Q. How long would you say that was?
A. You mean how long did we stay with them?
[fol. 63] Q. Yes.
A. I should judge an hour or an hour and a half, something like that.
Q. You stayed there with the taxi-driver that long?
A. Yes.
Q. You tied him up when you first got to the stopping place?
A. No, not until we were ready to leave, about dark.
Q. What did you tie them up with?
A. Some strips of a shirt.
Q. How many knives was in your party?
A. Why Murray was the only one I knew had a knife. No, we took two off the taxi-driver and the other fellow.
Q. They had pocket knives?
A. Yes, sir.
Q. What went with the knife Murray had?
A. I don't know. I believe he left it up in the woods. I don't remember him having it after he left here.
Q. Did he have it up there when you tied up the taxdriver?
A. I don't remember whether he did or not.
Q. Did you travel all night that night?
A. The biggest part, yes.
Q. What kind of country?
A. Through field and timber.

Q. Cross any streams.

A. No—well, small ones.

Q. Did you see Lute Savage the night of the shooting?

A. Did I see him? Yes, sir, I seen him when I was up on the wall, over by the garage.

Q. In front of the garage?

A. Back of the garage.

Mr. Carson: What was he doing?

A. Why, he was standing there.

Q. Did you hear Murray holler at him?

A. I heard someone, either him or Jones, I didn't take [fol. 64] particular attention, which one.

Q. What was said?

A. For him to come out from there, hands up, or something like that.

Q. Savage didn't have a gun at the time, he wasn't shooting?

A. I don't think he was. I never noticed any gun.

Q. Did you see him drop?

A. No, no. I don't think he dopped at the time he was shot, because I never seen him, he was standing, he walked, after they shot him, he walked away, and stood while I was running down the wall, I never did look back to see whether he did or not, if he fell it was long after he was shot after Jones shot him.

By Mr. Bower:

Q. All four of you jumped off the wall on the outside?

A. Yes, sir, outside the tower.

Q. And who went off the wall first?

A. I don't know. I don't know who was the first man or the second or third, because I went through quite a ways after the rest. They was all through when I got there.

Q. Where was Holman when you got off the wall?

A. Sitting down with his back against the wall facing the garage. I think he had been shot some place.

Q. Was Jones standing?

A. Jones was standing, just a second or so before I jumped off the wall, standing down there and he turned around and shot Holman when he was sitting down, I think he had been shot in the arm some place at the time because

he was lying down with his back against the wall, Jones shot him with the shot gun.

Q. When did Jones fall, before you got off the wall or afterwards?

A. Jones didn't fall, he sat down with his back up against the tower, facing the insane asylum.

Q. You and Willos never were in the building here at all?

A. No, sir, no part of it.

Q. Who all of the guards did you see that night?

[fol. 65] A. I saw Pete White.

Q. Where was he?

A. He come out of the turnkey's office after—just about the time Murray and Jones, or shortly after they—just about the time they entered. He stood between Willos and I, hollering, he didn't want them to shoot us with our hands in the air, so he told us.

Q. You don't know how many guards were on the tower?

A. No.

Q. Did you see any other guards outside?

A. I didn't pay particular notice who they was, I seen some."

STATEMENT OF JAMES WILLOS

"Questions by Mr. Carson:

Q. Your name is James Willos?

A. Yes, sir.

Q. Willos, will you give us your version of this escape that you were in with Murray and Jones and Kelley?

A. All right; whereabouts do you want me to start in?

Q. From the time you planned it?

A. From the time we planned it?

Q. Yes.

A. The first time we ever got to talking about it, we were sitting behind the wood-pile one day, and we got to talking about liberty, and we would all like to get out, you know, and Murray he made the suggestion about going out through the roof, and through the front gate, and it sounded all right to me, and they never at that time said anything about killing anybody, nothing like that, but I'd been here for a long time you know, seven years, and I had no understanding with them they would do anything like that, any-

thing like that was going to take place, I thought it was all right, and so I just went with them, and never thought no more about it.

[fol. 66] Q. Who was it cut the hole?

A. Why Kelley and I cut the hole.

Q. Was that the understanding?

A. Well, they thought it wouldn't be noticeable.

Q. They figured, Jones and Murray figured you and Kelley wouldn't be noticed as much as Jones and Murray, your absence?

A. Yes, so we cut it.

Q. When did you cut it?

A. Some time in the afternoon.

Q. On the day of the escape?

A. Yes.

A. And now when you come down the rope, Willos——

A. I was the last down the rope, yes, and this shooting started before I left the rope, and as soon as I hit the ground there was a guard there had Kelley with his hands in the air and told me to throw up my hands and I throwed them up, and we stood there with our hands in the air for three or four minutes I guess.

Q. Then what happened?

A. Then the first thing I knowed there was some shooting, I didn't know where it come from, but later on I understood it come from the turnkey's office, and I see them fellows come running out with guns toward the tower, you know, everything—it seemed like I couldn't very well help following.

Q. Who was it come out hollering—was it Jones or Murray that come out hollering "Come and get your gun" to you and Kelley?

A. Nobody said anything to me, at least I didn't hear it if they did.

Q. Where were you when they tossed the gun to you?

A. I was by the building.

Q. Whereabouts would that be, Willos?

A. That would be down this end of the building, I think (indicating) now where is Number 1? Over this way, close to the corner of the building, you know, that comes down that way.

Q. That is before you went through the tower?

A. Yes, before I went through the tower.

[fol. 67] Q. How many times did you shoot the gun?

A. About three times, running down the walk.

Q. The walk?

A. Yes, you know, from here, down to the other tower, I don't know the names.

Q. Seven is on the south and One is on the north.

Q. Well now, you were out near the corner of the warden's office when the gun was tossed to you?

A. Yes.

Q. Who tossed it to you?

A. Murray.

Q. What did he say when he threw it?

A. He just throwed it.

Q. What did he say?

A. He says "Here's a gun" and I picked it up.

Q. Then you started running for the oak tree?

A. Yes.

Q. Is that when you got to shooting?

A. No, I didn't——

Q. When did you do your shooting?

A. I done my shooting after I got over the tower. When I jumped over the wall. I fired three shots at the garage, I couldn't see anybody, but they was shooting pretty heavy, but I didn't know, I didn't know whether it came from the tower or not, so I fired three shots, but I didn't see nobody.

Q. Before you went through the tower?

A. No, after we got down.

Q. After you jumped down off Tower Number 1?

A. Yes.

Q. You shot three times toward the garage?

A. Yes, alongside the walk.

Q. Where was Jones then?

[fol. 68] A. Jones was sitting down there. When I hit the ground I seen him falling down.

Q. Had he been shot through the head?

A. I don't know—no, not at that time, he said "they got me" and Murray started running and I started right behind Murray, and Kelley was the last one to come over and he shook hands with Oregon Jones and said "Goodbye"—he told me afterwards, I didn't stop to see.

Q. You didn't stop?

A. No, because I was running pretty fast then.

Q. Did you see Holman sitting down there?

A. Yes, I noticed a guy sitting there.

Q. Had he been shot at the time in the head?

A. I don't know, I didn't pay no particular attention to him, I see him and Oregon Jones, as soon as we hit the ground and started running, I didn't look around for nothing. Murray says "Come on" says "let's go."

Q. Now when you were planning this, you and Oregon Jones and Murray and Kelley, was it decided that Murray and Jones were to make for the turnkey's office as soon as they come down the rope?

A. I don't know, they didn't say nothing about that part of it.

Q. How were you going through the front gate?

A. Well, we knew trusties were going through there all the time.

Q. You knew they wouldn't be going out at six o'clock?

A. Well, I didn't know, that was the understanding, we were going through the front gate.

Q. Was the idea to get the turnkey and force him to walk out through the front gate?

A. Yes—well, I don't know what Murray meant to do, but after Crawford came along I guess that spoiled it, he saw Murray coming down, and that might have interferred, I know there was no intention to shoot anybody, I know that much. Murray and Jones always said they didn't want to do no harm if they could get out.

Q. With whom were you celling?

A. I was celling with a fellow by the name of Fred Howard.

[fol. 69] Q. What kind of a gun did Kelley have?

A. What kind? He had a shot gun.

Q. Where did he get it?

A. Well, he must have got it on the tower, that's what he told me.

Q. What was done with that gun that was thrown him?

A. He throwed it away.

Q. Where?

A. Throwed it away that first night underneath an old log.

Q. And how far was that place he threw it away from where you left the taxi-driver?

A. That would be pretty hard to tell, I don't know. I judge about a mile or two, something like that.

Q. What did he say when he threw it away?

A. Well, he had no ammunition for it. He didn't want to pack it.

Q. Did he tell you he had shot it?

A. No, he didn't tell me.

Q. He didn't tell you he had shot it or anything else?

A. No, he didn't say, all he said was "I got an empty gun and no ammunition for it, it's no good."

Q. You had what kind of a gun?

A. A 38.

Q. Did you have a rifle too?

A. Yes, after I come through the tower.

Q. Whose rifle did you get?

A. I don't know.

Q. It was Oregon Jones', was it not?

A. I don't know, it was lying there and I just took it.

Q. You threw some of the guns away in Mock's Bottom in Portland?

A. Yes, we threw both of them away.

Q. Which ones?

A. The two 30-30s.

Mr. Bower: How many guns did you have altogether when you left here, after you started away from here?

[fol. 70] A. I don't know. Kelley had a shot gun and I had a 30-30 and a 38, and Murray had a 32-20 and a 38.

Q. How many rifles did you have?

A. Two rifles.

Q. And one shot gun?

A. Yes.

Q. And how many revolvers?

A. Two.

Q. What kind of guns did you throw in Mock's Bottom?

A. The two 30-30s.

Q. The rifles?

A. Yes.

Q. That left you with what?

A. The two revolvers.

Mr. Page: Did you pick up your rifle in the tower?

A. No, I got mine when I got down on the ground.

Q. After you jumped down?

A. Yes, sir, after I was through the tower.

Q. You don't know whether it was the rifle Jones had or not?

A. I don't know, I am not sure, I was so excited I didn't know what they did, just as I landed, I picked it up.

Q. Were you behind the oak tree on the north side of the yard?

A. Yes, we were both there.

Q. Who?

A. Murray, and Kelley come running over, toward this tree.

Q. You and Murray were behind the tree?

A. Yes, and Kelley?

Q. Where was Jones?

A. Well, I don't know.

Q. Did Murray do some shooting from behind the oak tree?

A. Yes, I believe he did.

[fol. 71] Q. Did you?

A. No.

Q. What kind of a gun did Murray use from behind the tree?

A. Well, it must have been the one he had, a 32-30. Because that is the only gun I seen him have.

Q. Revolver?

A. Yes.

Q. When did he get his rifle?

A. He got his rifle after he got on the ground, too, as far as I know, he was ahead of me, I didn't see what he did have.

Q. He might have had the rifle the same time he was behind the oak tree?

A. Well, I wouldn't swear to that because I didn't see it.

Q. Did you see Sweeney when he was hit?

A. No, I didn't pay no attention, I seen a man sitting there, I didn't know whether he was dead or not, I knew there was something the matter.

Q. You saw Murray shooting at him?

A. Well, as I was behind the tree there I wasn't looking much at that.

Q. Murray was shooting at Number 1 tower, wasn't he?

A. Yes.

Q. Shooting in the direction of Number 1?

A. Yes, in that direction?

Q. Did Murray tell you he had hit Sweeney?

A. Well, he didn't know, he knew he hit him all right, but he didn't know how badly he was hurt.

Q. What did he say?

A. He didn't say much, we didn't talk much about it. All Murray says, just as soon as he—just before he left the tree to run to the tower, he says "come on".

Q. Did you hear him say "I got him"?

A. No, I didn't hear him. If he did, I didn't hear him. I heard him say "come on, come on" and he started to run, and as soon as I got through the tower I see Oregon Jones falling down. I saw he was hit all right. He says "they got me". Then Kelley come, he was right behind me, and started running for the insane asylum. It was all done so quick, you know, a fellow wouldn't see half of it, we was [fol. 72] expecting to get hit any time, you know.

Mr. Page: Who preceded you through the tower? Did you follow Jones?

A. No, I followed Murray.

Q. Jones went first?

Q. (continued). He was the first man?

A. Yes, he must have been. He was sitting on the ground when Murray and I got out.

Q. Did you do any shooting from the tower?

A. No.

Q. Did Murray?

A. I don't know. I couldn't hear nothing, my ears were ringing so I couldn't hear who done any shooting.

Q. You said you shot over toward the garage?

A. Yes, I run along the walk.

Q. What were you shooting at over there?

A. I don't know, I couldn't see anything. I don't know where them shots went but I thought it might help me to get around the corner. I didn't see nobody there at the time. I know all them shots I fired went wild because I didn't aim at nothing.

Mr. Bower:

Q. When you left the machine, how far did you take the jitney driver at that time, just a rough estimate?

A. Perhaps a little over a quarter of a mile. Not any more than that.

Q. Was that daylight or dark?

A. Daylight, Getting about dusk.

Q. How long were you there with the jitney driver and his passenger before you left them?

A. Oh, I don't know what time it would be. It was dark when we left there.

Q. Did you have any knives there?

A. Yes, we got a knife off one of the taxi drivers?

Q. Did any of you fellows have any knife?

A. No.

Q. Did Murray have any knife?

A. Not with him then.

[fol. 73] Q. Didn't he have one he took from here?

A. I believe he did. I didn't see it.

Q. Didn't he have his knife when he went after Crawford?

A. I didn't see it. I didn't have no knife, I didn't have a thing on me when I come down.

Q. How far did you go from where you left the taxi driver to where Kelley left his shot gun?

A. About a mile o*f* so.

Q. What kind of country?

A. *T*retty rough. Brush piled up.

Q. Timber?

A. Yes.

Q. Or brush?

A. Well, kind of undergrowth, you know.

Q. Didn't you go through any open fields?

A. No, No.

Q. How far did you walk the railroad track before you came to Monitor the night you went through Monitor?

A. Well, not over four miles, I don't think.

Q. You must have come by the track pretty close of Mt. Angel?

A. Close, yes.

Q. See the lights?

A. We could see the lights.

Q. Do you remember crossing the railroad, on the county road, where you come to——

A. When you come to the railroad track.

Q. Then you followed the railroad track to Monitor?

A. Yes.

Q. You didn't leave any guns at Monitor?
A. No.
Q. You didn't leave any at Newman's?
A. No.
Q. You didn't leave any in the Newman car when you got [fol. 74] out of the Newman car in Portland?
A. No.
Q. You only had two revolvers in the party altogether?
A. Yes, that was taken from here, yes, that is all.
Q. You say the rifles were thrown away in Portland, in Mock's Bottom?
A. Yes, you asked me if I left any.
Q. I mean if you got any others?
A. No.
Q. You left the shot gun under the log?
A. Yes.
Q. And you threw the rifles away in the slough in Mock's Bottom?
A. Yes.
Q. That left you with two revolvers?
A. Yes.
Q. The one that Murray had and the one that you had?
A. Yes.
Q. Did you have any ammunition?
A. Yes, three shots in the—and Murray two, I think it was two, but I don't think they were any good, old ones, I don't think they were any good. I found them on the porch at Fall bridge and put them in a small box.

Mr. Page: How many times did you shoot the rifle?
A. I never shot it, I never fired it at all.
Q. How many shells were in it?
A. I don't know how many, I never looked in it.
Q. You must have, during the day some time.
A. No, I never looked, I thought it was full, because one was in the barrel and I looked in the chambers and knowed it was loaded, but never counted to see how many. None of us fired any of the rifles, they was all loaded when we throwed them away in Portland, I think all the shots was in them as when we got them."

Whereupon, at the close of the above testimony, Will R. King, counsel for defendants further objected on the ground

that the parties questioning defendants were state's attorneys and did not inform or apprise defendants or either [fol. 75] of them of that fact, and defendants were not apprised of their constitutional rights of counsel; which further objection was overruled by the Court, who said: "It is very clear to my mind that this testimony is only applicable to the defendant whose statement was being made, in other words, the alleged statement made by the defendant Kelley would not be binding against the defendant Willos and the alleged statement made by Willos would not be binding against defendant Kelley, and only so far as it tends to show the connection of the defendant speaking to the alleged offense would it be heard, and I will so instruct the jury at this time, which instruction was thereupon duly given. "The above ruling of the Court, in allowing the statements above set forth to be repeated by said witness in the presence of the jury, was excepted to by counsel for defendants, Will R. King, which exception was allowed by the Court, and the statements were thereupon repeated by the witness, this time in the presence of the jury.

Exception Number Twelve

Paul Burris, being called as a witness on behalf of the State of Oregon, after being duly sworn, was interrogated by John H. Carson, District Attorney, and in answer to some of such interrogatories, among others, gave the following answers:

"Q. Through the courtesy of the bailiff I will hand you State's Offer for Identification Number 20, please examine that and state whether or not that is the knife you found at the place you now mention?

A. Yes, that is the knife.

Mr. Carson: We offer that in evidence.

Whereupon, defendants, by their counsel, Will R. King, objected to said offer as incompetent and not sufficiently identified, which objection was overruled by the Court and an exception allowed. The Court thereupon permitted said [fol. 76] exhibit to be offered in evidence, and said exhibit was received in evidence and marked "State's Exhibit Number 20" which said exhibit is attached to this Bill of Excep-

tions, marked as Exhibit No. 20, and by reference made a part of this exception.

Exception Number Thirteen

OSCAR D. BOWER, a witness called on behalf of the State of Oregon, was duly sworn, and interrogated by John H. Carson, District Attorney, and in answer to some of such interrogation, gave, among others, the following answers:

"Q. Your name is O. D. Bower?

A. It is.

Q. Mr. Bower, you are the duly elected, qualified and acting sheriff of Marion County, Oregon?

A. I am.

Q. And you have held that office continuously since on or about January 1, 1921?

A. I have.

Q. And you held that official position particularly during the month of August, 1925?

A. I did.

Q. Were you present at the conversation between the defendants Willos and Kelley at the Oregon State Penitentiary, and ourselves, which Miss Barrett took stenographically?

A. I was.

Q. Subsequent to those conversations and particularly with defendant Kelley, did you in company with the defendant Kelley and others go out in the neighborhood of the Willard Church in this county?

A. Yes, sir.

Q. That Willard church referred to is the place referred to by the witness Zinn as the place where the automobile stopped the night of the break?

A. Yes, sir.

[fol. 77] Q. What was your purpose in going out in that neighborhood?

A. To try and find the place where Zinn described they had been tied, to find the knife if possible, and the further purpose of trying to find the gun, if possible, that Ellsworth Kelley claimed had been hid under a log.

Q. Were you present at the time the knife was found?

A. I was.

* * * * * * *

Q. Were you able with the help of the defendant Ellsworth Kelley, to locate the shot gun upon that occasion?

A. Not on that trip, that time.

Q. Later on did you go again?

A. I did.

Q. With whom did you go the second time?

A. Guards Golden and Edwards of the Oregon State Penitentiary, Deputy Sheriff Roy Bremmer, Deputy Sheriff Bert Smith, and myself.

Q. The defendant Kelley was not with you?

A. Not the second trip.

Q. Did you find the shot gun on that occasion?

A. I did.

Q. Where did you find the shot gun?

A. It was under a log, hid. It had been stuck under some weeds or dirt, vegetation, under the edge of a log, partly under *a* the log.

Q. Where was it with reference to the Willard Church or school-house?

A. Well, it was in a northeasterly direction, a little east of north, of the church, oh, perhaps a mile, perhaps not quite a mile from the church.

Q. State whether or not it was on the course taken by the defendant Kelley on his former trip out there in that neighborhood?

A. It was, on what he said to the best of his recollection was about the course they took.

[fol. 78] Q. And who was present at the time you found the gun?

A. Guards Golden and Edwards and deputies sheriff Bremmer and Smith.

Q. I will hand you State's Offer for Indentification "B" and ask you to examine it and state whether this is the shot gun you refer to, and the shot gun found by you on that occasion?

A. That is the gun.

* * * * * * *

Q. Was it concealed from view?

A. It was all concealed from view except perhaps eight or ten inches of the butt end of the gun.

Q. Now at the time you found it, did you attempt to pump the gun—that is what is called a pump gun, isn't it?

A. I think so.

Q. Did you attempt to pull back whatever lever there is upon it to ascertain whether it was loaded?

A. I did.

Q. Were you able to do it freely?

A. Not freely, on account of the loose dirt that had gathered in it, it had hardned, and rather hampered the free movement of the action of the gun.

Q. State whether or not at the time you found this gun it was loaded?

A. It was.

Q. I hand you further, Mr. Bower, State's Offer for Identification 26-A, please examine it and state whether or not that cartridge was in this State's Offer 20-B?

A. That is the shell that was taken out of the gun at the time.

Q. The gun you refer to is State's Offer 20-B?

A. It is.

* * * * * * *

Q. We offer, if the Court please, State's Offer for Identification 20-B.

Whereupon, counsel for the defendants, Will R. King, objected to the offer as incompetent, and not properly identified as the gun in the possession of either of the defend-[fol. 79] ants, which objection was overruled by the Court and an exception allowed. Thereupon, the Court permitted the said exhibit to be offered in evidence, and said exhibit was received in evidence and marked as State's Exhibit Number 20-B, which said exhibit is attached to this Bill of Exceptions, marked as Exhibit Number 20-B, and by reference made a part of this exception.

Exception Number Fourteen

The said Oscar D. Bower, witness called on behalf of the State of Oregon, being duly sworn, was further interrogated by John H. Carson, District Attorney, among other things, with reference to a cartridge, when said cartridge was offered in evidence as follows:

"Mr. Carson: We offer, if the Court pleases, as State's Exhibit 26-A, State's Offer for Identification, 26-A."

Whereupon, Will R. King, counsel for defendants interposed the objection that said offer is incompetent and not properly identified, which objection was overruled by the Court, and an exception allowed. Thereupon the Court permitted the said exhibit to be offered in evidence and said exhibit was received in evidence and marked "State's Exhibit Number 26-A," which said exhibit is attached to this Bill of Exceptions, marked as Exhibit Number 26-A, and by reference made a part of this exception.

Exception Number Fifteen

Tom Murray, being called as a witness on behalf of the defendants, and duly sworn, was interrogated by Will R. King, counsel for defendants, and in answer to such interrogation, gave, among others, the following answers:

"Q. I will ask this, for the purpose of saving the record,—you may state whether it was currently reported among you and the other prisoners, that shots were at different times fired into the bull-pen by Hinton or other guards?

A. Yes.

Thereupon, John H. Carson, District Attorney, duly objected, and moved that the answer be stricken from the record, which objection was sustained by the Court, and the Court thereupon instructed the jury to disregard the answer, to which ruling the defendants' counsel, Will R. [fol. 80] King, was allowed an exception.

Exception Number Sixteen

ELLSWORTH KELLEY, one of the defendants herein, taking the witness stand in his own behalf, was duly sworn and examined at length by his attorney, Will R. King, on direct examination; he was then interrogated at length on cross examination by John H. Carson, District Attorney, during which, among others, he answered the following interrogatories, as follows:

"Q. You say you were born in Wisconsin?
A. In Wisconsin.
Q. And lived in Iowa for a while?
A. I did.
Q. Did you get in trouble in Iowa?

Thereupon, Will R. King, defendants' counsel, objected as incompetent and not proper cross examination, which objection was overruled by the Court, and an exception allowed.

Exception Number Seventeen

The said ELLSWORTH KELLEY, one of the defendants herein, being then further interrogated on cross examination by John H. Carson, District Attorney, gave among others, the following answer to such further interrogation, to-wit:

"Q. Were you ever convicted of a crime in Multnomah County, Oregon, or a couple of crimes, for that matter?
A. Yes.

Whereupon, Will R. King, defendants' counsel, objected as incompetent and not proper cross examination, which objection was overruled by the Court, and an exception allowed.

Exception Number Eighteen

The defendant JAMES WILLOS, taking the stand in his own behalf, and having been sworn, was interrogated at length by his counsel on direct examination, and examined at length on cross-examination by the district attorney, John H. Carson, when, among others, he gave the following answers to the following interrogatories:

"Q. Were you ever convicted of a crime before this conviction in Umatilla County?

[fol. 81] Whereupon, Will R. King, defendants' counsel, objected as incompetent and not proper cross examination, which objection was overruled by the Court, and an exception allowed.

Exception Number Eighteen

The defendant JAMES WILLOS, taking the stand in his own behalf, and having been sworn, was interrogated at length by his counsel on direct examination, and examined at length on cross-examination by the district attorney, John H. Carson, when, among others, he gave the following answers to the following interrogatories:

"Q. Were you ever convicted of a crime before this conviction in Umatilla County?

Whereupon, defendants' counsel, Will R. King, interposed the objection that this is not proper cross examination, which objection was overruled by the Court, and an exception allowed, when the following questions were asked and the following answers given:

By Mr. King:

"Q. Just answer yes, or no.
A. Yes.

By Mr. Carson:

Q. In Oklahoma?
A. In Oklahoma?
Q. Yes.

Whereupon, defendants' counsel objected as not proper cross examination, which objection was overruled by the Court, and an exception allowed, when the examination proceeded as here set forth:

"A. What did you say that charge was?
Q. Were you convicted of a crime in the state of Oklahoma?
A. Yes, I was.
Q. What crime?
A. Supposed to be larceny of an automobile.
Q. Were you in the Oklahoma Reformatory?
A. I was, yes.
Q. For how long a time?
A. Sixty days.
[fol. 82] When?
A. I don't quite remember.
Q. Give us some approximate idea of the date?
A. Might have been 1921.

Whereupon, the defendants' counsel, Will R. King interposed an objection stating: "I object to all this as not proper cross examination" and an exception was duly allowed by the Court.

Exception Number Nineteen

The said James Willos, being then further interrogated by John H. Carson, District Attorney, on Cross examination, as follows:

"Q. As a matter of fact, you are an escape out of the Oklahoma Reformatory right now, aren't you?

Whereupon, Will R. King, counsel for defendants, objected as argumentive, and not proper cross examination, which objection was overruled by the Court, and an exception allowed.

Exception Number Twenty

The said James Willos, being further interrogated on Redirect Examination by his counsel, Will R. King, gave among others, the following answers to such further interrogations:

"Q. At the time you were taken to the bull-pen as indicated by some of the questioning, state whether or not you were examined by anyone for your sanity?

A. Yes, I was.

Q. By whom?

A. The prison doctor.

Q. State the circumstances of that examination?

A. Well, he asked me if I had ever been in an insane asylum, and I told him no, and he asked me if I knew if I had been crazy at any time, and I told him I didn't know whether I had been crazy or not, but everybody thought I was crazy.

Q. What?

[fol. 83] A. Everybody in the prison thought I was crazy.

Q. Did you feel they thought that?

A. Yes, they told me.

Q. Who told you?

A. Why some of the prisoners in the yard. I don't know who they were, but they told me at the time the prison officials thought I was crazy.

Q. What prison officials were present when this examination took place.

A. Why I believe the deputy warden was.

Q. Mr. Lillie?

A. Yes, sir.

Q. Remember anybody else?

A. The prison doctor, that is all.

Q. Was Mr. Charlton present, do you remember?

A. Not at that time, he was not.

Q. Did Mr. Charlton say anything to you about being crazy?

Mr. Carson: Objected to, if the Court please.

Q. Well, did anybody else say anything to you about it?"

Thereupon, Mr. John H. Carson, district attorney, objected as incompetent, irrelevant and immaterial, which ob-

jection was sustained by the Court, and an exception allowed counsel for defendants.

Exception Number Twenty-one

JOHNSON SMITH, a witness called in behalf of the defendants, and duly sworn, was interrogated at length by Will R. King, attorney fo rdefendants, and answered, among others, the following questions:

"Q. Was Mr. Kelley, the defendant here, during your incumbency, confined in the bull-pen?

A. I believe he was.

Q. Did you have occasion to notice any effect that this confinement may have had upon his mentality, before and after?

A. Upon Kelley?

Q. Yes.

A. No, I don't think he was in the bull pen only a few days when I was there, a very short period.

[fol. 84] Q. Was that long enough in order for you to determine whether there was any change in him?

A. No, not in Kelley's case.

Mr. King: If the Court please, I want to save my rights in this matter and I think perhaps I would like to state the purpose——

The Court: Reduce it to writing.

Thereupon, the defendants' counsel, Will R. King, submitted a written offer to the Court, which is herewith set out, as follows:

"The purpose of the interrogatory to Mr. Johnson Smith, is to show that he, by experience and observation, had an opportunity to observe the change and effect of confinement in the bull pen in the Oreg. State Prison, had or has upon the mentality of inmates confined in what is known as the bull pen and dungeon of said prison, that any confinement in excess of a few days was noticeable upon the mind and actions of those so confined, and to state actions disclosing an unfavorable change in the mental action and action of the mind to a material extent upon the individuals so confined, expecially when for periods of more than a week to ten days."

Thereupon, John H. Carson, District Attorney, duly objected to the above offer of proof on the grounds same is incompetent, irrelevant and immaterial, and the further ground it has no reference to these defendants, which objection was sustained by the Court, and an exception allowed.

Exception Number Twenty-Two

E. H. Lister, a witness called on behalf of the defendant Kelley, after being duly sworn, was interrogated by counsel for defendants, Will R. King, as to said Kelley, among others, as follows:

"Q. What was his tendency as you observed, with reference to being truthful under all circumstances, or otherwise?

Mr. Carson: That is not proper, if the Court please, as going into reputation, we should have had to attack it——

Mr. King: I can state the purpose.

[fol. 85] The Court: I know what you have in mind, but it occurs to me this witness has gone as far as he could when he says he found him in instances he had personal knowledge of, to be truthful.

Mr. King: The thought I had in mind, is one type of paranoia——

The Court: The thought I had in mind is this witness can't answer that question only as it affected his experience with the defendant, and he has answered that.

Mr. King: May I put in writing what my *purpose it?*

Whereupon, counsel for defendants prepared and submitted his offer of proof in writing, to the Court, which offer is set out herewith:

'The purpose of this line of examination is the result of suggestion or statement by Dr. Griffith, in Murray case to the effect that one species of insanity is that the one affected would invariably tell the truth, and even tho insane or had hallucinations, they in attempting to carry out plans would deceive no one either before or after the act.'

Whereupon, the Court rejected the said offer, saying:

'My ruling is this wtiness may testify to his experience—and he has testified to his experience, with respect to that

particular characteristic, as referring to the defendant in question."

[fol. 86] Exception Number Twenty-Three

At the close of the introduction of testimony, and before the beginning of argument to the jury, the defendants by their counsel requested the Court to give the following instruction:

I instruct you, ladies and gentlemen of the jury, that defendants are on trial charged with having killed John Sweeney and no one else. Whether any other person was killed or injured on the occasion may be taken into consideration, including how he may have been killed, or by whom, may only be considered by you as one of the incidents or circumstances connected with the killing, if any one was killed, in determining who killed John Sweeney, and who, if anyone, may have aided or abetted therein.

The Court refused to give said instruction, to which refusal of the Court the defendant by his counsel duly excepted, which exception was allowed by the Court.

Exception Number Twenty-Four

Defendant's Requested Instruction to Jury

At the close of the introduction of testimony and before the beginning of argument to the jury, the defendants by their counsel also requested the Court to give the following instruction:

I further instruct you that under the law of the land, under the fundamental laws, National and State, under which we are governed, it is provided that cruel and unusual punishments, shall not be inflicted and if you find under the evidence adduced that cruel and unusual punishments had been inflicted upon defendants, or either of them, and that under methods and procedure in general use in the Oregon State Penitentiary defendants or either of them had cause to fear repetitions thereof, at great risk of bodily harm, which includes enforced ill health to body or mind

by reason of methods alleged to have been used, or that may have been used with respect to defendants within a rasonable time prior to the alleged break of defendants from said prison, and that defendants were living in enforced fear and belief of unlimited repetition thereof, and that escape was the only practicable means of avoiding such believed great bodily harm, if it was believed, then you may take such consideration in arriving at a verdict, or verdicts, in this case.

[fol. 87] The Court refused to give said instruction, to which refusal of the Court, the defendants, by their counsel, duly excepted, which exception was allowed by the Court. For a partial understanding of said requested instruction that part of the testimony of the defendants Ellsworth Kelley and James Willos upon which instruction was requested, is attached hereto, made a part of the Bill of Exceptions, and for the purpose of identification same is marked Exhibit "X."

Exception Number Twenty-Five

At the close of the introduction of testimony and before the beginning of argument to the jury, the defendants by their counsel requested the Court to give the following instruction:

Some evidence has been admitted showing certain statements and admissions made by defendants but not under oath. I instruct you that while signed statements or admissions are admissible and may be considered in your deliberations, they are to be viewed with caution, and in considering them you may take into consideration all the circumstances under which made, whether under fear, hope of reward, or any other circumstances surrounding the same which may during the trial have come to your attention.

The Court refused to give said instruction, to which refusal of the Court, the defendant by his counsel, excepted, which exception was allowed by the court.

Exception Number Twenty-Six

At the close of the introduction of testimony and before the beginning of argument to the jury, the defendants by their counsel requested the Court to give the following instruction:

The right to qualify a verdict of murder in the first degree of guilty of murder in the first degree by adding the words "we recommend life imprisonment" is thus conferred upon the jury in all cases of murder in the first degree. The law does not itself prescribe any rule defining or circumscribing the exercise of the right, but commits the whole matter of its exercise to the judgment and conscience of the jury. This being the law, you are not limited in your [fol. 88] deliberations to the testimony adduced at the trial; nor is it dependent upon mitigating or palliating circumstances, you are accorded the privilege, under the law, of making such recommendation for whatever reason your conscience may dictate; and if after taking into consideration the entire evidence, whether such evidence shall be sufficient in your judgment to establish the insanity defense relied upon beyond a reasonable doubt or not, you are at liberty to take into consideration any or all evidence, if any, adduced for that purpose in determining whether in the exercise of your discretion or conscience with reference to such recommendation, you may return a verdict with recommendation for life sentence as I have stated, or disregard the same and return such verdict whether for or without a recommendation of life imprisonment. And in this connection, I instruct you, that as to how far considerations of age, sex, illness, if any, or mental impairment, in any, or intoxication, of whatever nature or kind, if any, or mental impairment, if any, or human passion, or weakness or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, all of which committed by the constitution of this state and legislative enactment based

thereon to your sound discretion and to your sound discretion alone.

The Court refused to give said instruction, to which refusal of the Court, the defendants, by their counsel, duly excepted, which exception was allowed by the Court. For a partial understanding of said requested instruction that part of the testimony of the defendant Ellsworth Kelley and of the defendant James Willos, upon which said instruction was requested, is attached hereto, made a part of the Bill of Exceptions, and for the purpose of identification, same is marked Exhibit "X."

[fol. 89] [Title omitted]

EXCERPTS FROM TESTIMONY OF DEFENDANT ELLSWORTH KELLEY

ELLSWORTH KELLEY, being duly sworn as by law required, was interrogated, and testified, among other things, as follows:

Direct examination by Mr. King:

Q. I will ask you if you were ever in what is known as the bull-pen?

A. Yes.

Q. Ever in the dungeon?

A. I was in the dungeon in the bull-pen.

Q. Which number is that?

A. The first cell, number 1.

Q. How long were you there, and when?

A. Well, I was there in 1924.

Q. For how long?

A. Several days, I can't recall the exact amount of days, I was in the dungeon in the bull-pen and then I was transferred to one of the other cells, as I became so faint during the hot weather that they was afraid to leave me in there.

Q. How long were you there altogether on that occasion? How many days, do you know?

A. Well, I might be able to figure it out, I couldn't say off-hand.

Q. Three months, a month, or a week, or what, just a general estimate?

A. Well, I was there about fifteen days during that time, I——

Q. Were you there at other times?

A. Yes,—well, I was there before that.

Q. For how long a time?

A. 31 days.

Q. When was that?

A. That was during the month of May, I believe.

[fol. 90] Q. What cell did you occupy then?

A. Number 3.

Q. What other times were you there?

A. Well, I was there the third of March, 1923, in the bull-pen for a period of 25 days.

Q. Were you alone or with someone?

A. Well, there was three of us confined on the same charge—attempting to escape.

Q. In the same cell?

A. Oh no.

Q. Anyone in the cell with you?

A. No.

Q. Alone?

A. Alone.

Q. During the time you were there,—what conveniences did you have in the cell?

A Practically none.

Q. Have any bedding?

A. Two blankets.

Q. And what kind of a bed, if any, did you have besides that?

A. Nothing but steel slats on the bunk which were set a couple of inches apart, worse than sleeping on the ground.

Q. When you say "ground" you mean floor?

A. Floor, rather.

Q. How often did you receive your meals?

A. One small meal a day.

Q. And were you allowed to read any?

A. No, sir.

Q. Allowed to communicate with your friends?

A. Only by hollering over to the other prisoners confined in the bull-pen.

Q. Did you receive any medical attention?

A. Practicaly none. A person had to be very sick to get any medical attention in the bull-pen.

Q. What opportunity did you have, if any, of communicating with any one outside the prison?

[fol. 91] A. None whatever.

Q. Were you permitted to write to anyone?

A. No, sir.

Q. Permitted to see anyone, and if so, whom?

A. No one unless it was the warden.

Q. You mean the warden or the one in charge?

A. Well, then, through their permission.

Q. Through the permission of who?

A. Well——

Q. Did the warden have you in direct charge, all of you in the cells, or was someone else in charge?

A. Well, the chapel guard was in charge of prisoners as far as bringing their meals and letting them sweep their cell once in a while, and changing their buckets.

Q. How often was that permitted, sweeping the cells and cleaning out the cells?

A. Well, it is hard to state exactly, I should say half the time or so.

Q. About every other day?

A. Approximately.

Q. How often were you given exercise?

A. Well, whenever they felt like turning us out into the bull-pen.

Q. You mean out in the court?

A. Out in the court.

Q. About how often did that occur?

A. Well, the time I was confined down there I was allowed to walk around out there every other day for approximately a couple of hours.

Q. Did that depend on the weather. Suppose it was rainy weather, how often?

A. Well, then, it wasn't so regular. We would be confined in our cells then.

Q. Was there any toiled except the buckets?

A. Nothing but the buckets.

Q. How often were they removed?

A. Most generally every day.

Q. Was there sometimes it would go longer than a day or two?

[fol. 92] A. Sometimes it went considerably longer.

Q. About how long have you known it to go while you were there?

A. Oh, I would say, three days.

Q. Did anyone come to see you during that time other than bringing you meals?

A. Not that I can recall.

Q. During each of these times you were confined there were you informed as to what charge was against you?

A. Sometimes I were not.

Q. How did you find out what the charges were?

A. Just merely through hearsay.

Q. How would you get the hearsay?

A. Through other prisoners, mostly.

Q. Were you ever given a chance to reply to any charges against you before being convicted?

A. Very seldom.

Q. Now what experience, if any, did you have with the guards on the wall during that time?

A. Well, there was two different occasions during 1924, Mr. William Hinton, who is known to be somewhat of a killer, at least a potential one, fired down into the bull-pen cells on two different occasions, while I was confined in the bull-pen.

Q. Were the doors closed at the time of the firing?

A. The doors were closed.

Q. And locked?

A. And locked.

Q. Did he fire into your cell?

A. No.

Q. How near to your cell was it?

A. Oh about, I was in Number 3, and Mr. Hinton fired in Number 7, one time, and I was in Number 3 when he fired in Number 8.

Q. Was there any apparent provocation for this firing into these cells?

[fol. 93] A. Absolutely none whatever.

Q. During the time that you were incarcerated there, or in prison, did any knowledge come to you of anyone having been injured or killed by being fired into?

A. Yes, sir.

Q. State what your information was regarding that, that is, what you heard?

A. Before I came in 1923, in January, there was a man by the name of James Ogle——

Mr. Carson: The State objects to any transaction which occurred in the penitentiary before this defendant was even confined there.

The Court: I think he may testify what was told him.

Mr. King: What came to him——

Mr. Carson: On the question of mental condition?

The Court: On the question of mental condition the latitude is very extensive.

Q. You may proceed.

A. Well, I was given the information that a man by the name of James Ogle had had different altercations with John Davidson, who had the reputation of having killed several convicts during his life, all in just such a helpless state as he was at the time. He was killed some time——

Q. Just state what information you received?

A. The information I received in that respect was that he was killed by Davidson as he was taking his exercise, walking around the ring, known as the bull-ring, and as I heard it, as he made his first revolution on the ring, Davidson shot him from behind, killing him, then taking his body and pulling it over the wall on a rope. Someone had put a rock down close to the ground where he was killed, as an excuse for Davidson shooting him.

Q. This information all came to you after you were in prison? And while you were in prison?

A. Yes, sir.

[fol. 94] Q. Or while you were in the bull-pen, or other times?

A. Well, it came to me in the bull-pen.

Q. How did that affect you, as to believing it, or otherwise?

A. Well, I had to eventually believe it, as it was substantiated by quite a number of prisoners that were there during the time?

Q. What effect, if any, did that have on your own mind, as to putting you in fear or otherwise, of your own safety?

A. Well, during all the different experiences that I had

in such respects I was in constant fear that my turn would be next.

Q. Did you have this in mind at or near the time you made your excape?

A. I did.

Q. How constant was this fear, if any?

A. It was constant, I will say, in the extreme.

Q. Did you receive any other information with reference to your safety from any other sources?

A. Yes, sir.

Q. You may state what that was?

A. I heard by one of the prisoners that there were several of us marked to be shot at the least provocation, my name being among them.

Q. How many were there on the list?

A. I heard of several, Tom Murray, myself, James Willos, Oregon Jones, and I am not sure about the other two, but I heard there was supposed to be six.

Q. Did you believe it when you heard it?

A. Under the conditions I was forced to believe it.

Q. I will ask you what effect, if any, did your incarcerations in the bull-pen under the conditions you have named, have upon your feeling of safety in general, or mental state of mind?

A. It was a very severe strain on anyone's mentality to be in constant fear of their life at all times, such as existed in my mind during my confinement in the Oregon State Prison.

[fol. 95] Q. What effect, if any, did your confinement itself appear to have under the treatment you have stated?

A. Very depressing.

Q. Were you permitted to have a physician during any of that time? During the time you were incarcerated in the bull-pen?

Allan Carson: The State objects on the ground there is no showing there was ever any necessity for a physician.

Q. During the time you were confined in the bull-pen was there any occasion when you felt in need of a physician and medical attention?

A. Well I had fever and constant headaches while I was in the bull-pen, but medical attention was very hard to get in the bull-pen.

Q. Did you make an effort to get any?
A. Several times I made an effort and very seldom has it been granted me.
Q. To whom would you make these efforts?
A. Mostly to Mr. Carey.
Q. Who is he?
A. The chapel guard during the day shift, at present.
Q. Is he the gentleman who testified in this case?
A. He is.

[fol. 96] JAMES WILLOS, being duly sworn as by law required, was interrogated, and testified, among other things, as follows:

Direct examination by Mr. King:

Q. Now since the time you have been there, what experience have you had, if any, with reference to being incarcerated in the dungeon, or bull-pen as they call it?

Mr. John Carson: On the question of mental condition?
The Court: Yes.
Mr. King: Certainly.

A. Well, the first time I was in the bull-pen, I think I had been in prison about sixty days, that was in May, '24.
Q. How long after you were there; you went in in April?
A. I went in in April.
Q. Were you informed as to why you were placed there?
A. No, sir, I wasn't. The door was locked in the cell one morning when I woke up, I didn't know what was the matter, when the line was going out for breakfast I couldn't get out. Later a guard come up and told me to take my blankets, and searched me, and I was taken to solitary confinement.
Q. Did he give you any reasons why you were going——
A. No, not at that time.
Q. How long before you knew why you were there?
A. Well, after I got locked up, some of the boys told me there was a tunnel located somewhere close to the north wall and I happened to be working at some place near there

at the time, and I guess the prison officials suspected me of being implicated also.

Q. Talk to the jury and talk louder.

Q. (continued.) State that again, you were working near there, were you?

A. Yes, I was working near.

Q. Near where?

A. Near the north wall where this tunnel was supposed to be located.

Q. What doing?

A. I was piling wood.

[fol. 97] Q. Were you connected with the tunnel in any way?

A. No, sir, I had nothing to do with it, I didn't know anything about it.

Q. What opportunity was given you at the time you were taken to the bull-pen to explain the situation?

A. No opportunity at all, they never said nothing.

Q. And how long before it was explained to you by any of the officers or anyone in charge?

A. It was never explained to me.

Q. Was anything said about it at all by anyone in charge?

A. No.

Q. All you knew was what you could gather from other prisoners?

A. That is all.

Q. Did you request that you be given an explanation?

A. Well, I didn't ask them. I never had a chance to talk to any of them.

Q. During the time you were incarcerated there, did you have a chance to talk to any of them?

A. I talked to some of the guards that brought us bread and water was all. One was Mr. Fisher. I talked to him at the time, and all he said was "well I am sorry for you."

Q. Where were you?

A. Out in solitary.

Q. What ceil?

A. Why that was in the death cell.

Q. Number 1?

A. No, it was in the part of the prison where we are confined now, in the west wing.

Q. The west wing, is that the one they call the dungeon?
A. No, sir.
Q. The North wing?
A. Yes, the north wing.
Q. Which floor was that on?
A. On the first floor.
[fol. 98] Q. First?
A. Yes.
Q. Where with reference to where the dungeon is, or the bull-pen?
A. The bull-pen is located in the other end of the building.
Q. Oh, you were in the north end?
A. Yes.
Q. And the first floor?
A. Yes. The bull-pen at the time was full and they couldn't put any more in there so we were put in solitary in the north wing.
Q. When you say "full" how many would that mean?
A. Two in each cell.
Q. And how long did you remain in the death cell?
A. Eleven days.
Q. Were you alone at that time?
A. No, sir. There was another fellow there with me.
Q. What accommodations were you given with reference to sleeping or eating?
A. The first night all our clothes were taken away from us.
Q. Did you have any clothes one?
A. No, sir.
Q. What time of the month was that?
A. In May.
Q. You were left without any clothes on at all?
A. Yes.
Q. How long were you in that condition?
A. Over night until the next morning, about nine.
Q. Then what was the situation?
A. We asked for our clothes and they were given to us.
Q. When did they remove your clothing, after you got to that cell or before you left your own?
A. No, they took them away just before they locked us up.
Q. How long did you remain in that particular cell?

A. Over night—in that cell?

Q. Yes.

[fol. 99] A. Eleven days.

Q. And twenty-four hours without clothes?

A. Yes, something like that.

Q. What did you have to eat during the time you were confined in that cell?

A. A couple of slices of bread a day.

Q. Any water?

A. Yes, there was water, all the water you want.

Q. They didn't limit you on that?

A. No, sir.

Q. Was there water in the cell?

A. Yes, sir.

Q. Now what other experience did you have with reference to the bull-pen, being confined in the bull-pen or solitary confinement?

A. In December, between New Years and Christmas, I was assigned to the bull-pen. I had a misunderstanding that morning with one of the guards. We were wheeling concrete up a platform, I should judge about a forty-five degree, something like that, pretty steep, and I wasn't going fast enough, or something, to suit, something to that effect, and I was put in the bull-pen.

Q. Was that given as the reason, because you were not going fast enough up the incline?

A. Yes, sir, I told him I was doing the best I could at the time, I was sick, but I says "I am doing the best I can," he says—told me "that's the old story" and told me to go to the captain's shack.

Q. Where.

A. The captain's shack, and the captain put me in the bull-pen.

Q. Where is the captain's shack?

A. Located in the yard.

Q. Who had charge of that?

A. Mr. Golden at that time, I think, I am not sure.

Q. What took place with reference to informing you the reason for sending you to the bull-pen?

[fol. 100] A. Well, they didn't say any more about it.

Q. How long were you there that time?

A. Seventeen days.
Q. What cell did you occupy?
A. Occupied the dungeon.
Q. Where was that?
A. That is the first cell as you go down the steps.
Q. Toward the north end?
A. Yes.
Q. On the first floor?
A. There is only one floor there in the bull-pen.
Q. That is the south end of the building?
A. Yes.
Q. You were there seventeen days?
A. Yes.
Q. Anyone with you?
A. Yes, quite a few down there.
Q. Anyone in the same cell with you?
A. No, there was not.
Q. What sleeping accommodations?
A. One blanket—two blankets, I should say, that was all.
Q. This was the time you were there in December.
A. Yes.
Q. Have any heat in the cells?
A. I should say not.
Q. What means did you have for keeping warm?
A. Walking up and down the floor.
Q. How were you fed?
A. Once a day.
Q. How was that furnished to you?
A. In a bowl, a small bowl, I think, of beans and two slices of bread.
[fol. 101] Q. How did they get it in the cell?
A. They brought it down and there was a small wicket in the door and the boy reached it in to you.
Q. How often were you exercised?
A. I was never exercised during that seventeen days. They exercised the other boys, but I was left in the dungeon.
Q. How often was the cell taken care of in the way of being cleaned out?
A. Oh, about—sometimes every other day, and sometimes it would be more.
Q. What is the longest time that you remember?

A. Four days, I remember of.

Q. Did you have any way of keeping track of time there?

A. No, no way of keeping track of time.

Q. Except day or dark?

A. That is all, walking up and down the floor.

Q. What is the size of that cell?

A. It is about six feet long I judge and nine feet high, something like that.

Q. How wide?

A. About five feet.

Q. Now what other close confinement did you have, solitary or otherwise?

A. I was in the dungeon.

Q. Where is that located?

A. Located on the first floor, in the north wing of the cell house.

Q. How long were you there?

A. I was there 11 days.

Q. Were you permitted to wear your clothing during that time?

A. Yes.

Q. What sleeping accommodations did you have?

A. There ain't no sleeping accommodations.

Q. Any blankets?

A. No, no blankets.

Q. Any way to keep warm other than the natural condition of the cell?

[fol. 102] A. No, sir, that is all.

Q. When was this, during what time?

A. In October.

Q. What time in October, if you know?

A. I think it was—I am not sure, whether it was the first part of the month of October or the latter part, I am not sure.

Q. What was the condition of the weather as to being comfortable or otherwise?

A. Well, it was raining continually.

Q. Did you suffer any with cold?

A. Oh yes.

Q. What was the state of your health during that confinement?

A. Why I was sick at the time.

Q. At the time you were placed in there?

A. Yes.

Q. What medical attention, if any, did you receive?

A. I didn't have any.

Q. Did you ask for it?

A. I did ask Carey for a doctor to come down, I told him I had inflammatory rheumatism and was spitting blood, I believe he saw the blood on the floor, but Carey just laughed at me.

Q. Is that the Carey that testified yesterday?

A. That is the Carey that testified yesterday.

Q. Did he have charge of you at the time you were incarcerated in the bull-pen at the times you have mentioned?

A. Yes.

Q. What effect, if any, did these incarcerations have on your mentality, on your mind, if you know?

A. Pretty bad.

Q. How long after the incarcerations would you feel you had recovered from the effects, the physical effects, or otherwise?

A. Well, after a fellow has been in the bull-pen and the [fol. 103] dungeon for quite a few days it is pretty hard to recover and get back in shape again, because the meals you obtain in there are not very suitable, it takes a long time.

Q. How about the food, the effect it has on your condition?

A. Well, I don't hardly know how to answer that question.

Q. Were you physically strong or weak?

A. Why, I was weak, yes.

Q. How long before you could do any physical work, labor?

A. Well, a couple of weeks, or so.

Q. How often did you get a bath while in this incarceration?

A. Why, you never get a bath.

Q. Give you any change of clothing?

A. No, sir, I should say not.

* * * * * * *

Q. While you were incarcerated on these occasions you have mentioned, did you hear anything of any shooting in the cells or the bull-pen?

A. No, I can't say I did, not while I was confined there.

Q. Do you know of those things happening?

A. Yes, I do.

Q. State what you had heard or knew about incidents of that kind?

A. While I was in the bull-pen I had other prisoners tell me what had took place in there already. One prisoner—one instance about James Ogle that was killed in the bull-pen and his body hoisted over the wall, and I was also informed by one of the prisoners in prison that I was going to be taken to the bull-pen and shot. I recalled Mr. Charlton's attention to that fact some time later. I guess he will testify to that on the stand some time.

Q. Were you told of any certain number of shots that had been fired in the bull-pen previously or any time?

A. Yes, I was.

Q. Did you see—observe any indications of those shots at any time?

A. Well, you can see the shots on the wall, where they entered the bull-pen wall. I have been in the cells myself [fol. 104] and seen the bullet-hole in the cells and I asked the boys what that was and they told me that it was a bullet hole of a 30-30 rifle, so I asked them if they shot into the cells when a man was not armed and locks on the door and no possibility of a man getting out, and they told me "yes."

Q. What effect did that have on you as being in a state of fear or otherwise?

A. I did not know what to think, I was thinking about what this other prisoner told me I was supposed to get the same thing, and I thought that day might come all right; I didn't know for sure.

Q. What bearing did that have on your desire to want to get out of prison?

A. Well, when a fellow finds anything like that out, of course he likes to get away if he possibly can, I didn't see any reason to kill me, I had never done anything in there that I know of, I had no intentions to do anything.

* * * * * * *

Q. How long were you there at that time?

A. I was there thirty days.

Q. Were you permitted to communicate with friends while there?

A. No, sir, I should say not.

Q. Write any letters?

A. No, sir.

Q. Permitted to see anyone?

A. No.

Q. Could you see the warden, or the guard—whoever was in charge of it?

A. No, you can't see the warden. Sometimes I asked for the deputy warden to come down, but I don't think my request was granted.

* * * * * * *

Q. Did you have any other information from any source with reference to any dangers you were in?

A. Yes, I was told on several occasions——

Q. State what that was?

A. That I was supposed to be shot at the least provocation, and also there was a reward of fifty dollars to the man that got me, I was told that by other prisoners.

[fol. 105] Q. Did you believe that when you heard it?

A. Why certainly I believed it.

Q. This information you received at different times, what bearing did it have on your desire to escape on August 12th?

A. Well, I thought if I could get away I would try it, on account of what the prisoners had told me I was going to get killed, and that I had no chance, and also Mr. Charlton made the remark one day I would have to do my time in there, which was seven years, there was no chance for me; he also asked me one morning why I didn't stop trying to get away, why I didn't stop trying to escape from the penitentiary; at that time I had made no move whatever trying to get away from there.

* * * * * * *

Q. How did the danger of making your escape in your mind, compare with the danger of remaining there under

those conditions, as you believed them to be, did you feel you were in danger either way?

A. Yes, I did, to a certain extent.

* * * * * * *

Q. I will ask you if you ever at any time in your life met with any serious accident, in the way of receiving a fall, or anything of the kind?

A. Yes, sir.

Q. When was that?

A. About four years ago in the state of Wyoming.

Q. You may state the circumstances and what happened?

A. At that time I was working for a sheep outfit in Evanston (?) Wyoming, and I was working there for about a week, I should think, and one night I was sent out to get the herd and bring it to the feeding ground, and my horse got away from me that night, and I couldn't find it no place, and there in the corral there was a couple of bronchos, and I got one of those horses, thinking I could round up the sheep with it, and I was trying to gather up the sheep and the horse fell, and I went out—when I woke up the horse was standing grazing quite a ways from me and the saddle was [fol. 106] under his belly, and in the meantime one of the sheep herders at camp was out looking for me, but he couldn't find me. I told the man I was working for, I wanted to quit the job. I didn't feel good, and I had to wait for another man to take my place, but finally there—he made arrangements so I could be relieved by another man, it took about a week or so I should think. I didn't have a chance to talk to a doctor or anything so—it was quite a ways from town.

Q. How long do you know, I will just ask you, were you unconscious? You say "you woke-up" what do you mean by that? Had you been unconscious?

A. Well the next thing I knew nothing, I must have been I guess.

Q. Do you know how long you were unconscious?

A. Well, I went out just before dusk and it was dark when I woke up.

Q. About what time of day was it?

A. I left about—I left camp about half past five and I was back about eight o'clock at night.

Q. Where did you appear to be bruised, about the head in any way?

A. Yes, and my nose.

Q. And what other parts of your head?

A. The back of my head.

Q. Remember how you were lying when you woke up, or came to?

A. I was lying on my back.

Q. What was the nature of the ground on which you were lying?

A. Kind of rim rock, prairie country you know.

Q. How did you happen to fall off your horse?

A. Why the horse was never rode before, and I guess he got scared at something, I was going pretty fast trying to round up the sheep before it got dark, and the sage brush is pretty heavy in that part of the country and I guess he fell.

Q. Now in the examination of you when you were on the witness-stand, I did not go into the early part of your life; will you tell the jury something about your life up to the time you got into trouble and was in San Quentin, as you stated?

[fol. 107] A. Yes, I was born——

Q. Where you were born, and so forth?

A. I was born in the state of Arizona, —— Valley, located near the border of Mexico and the United States. My mother died when I was two years old I understood, or found out afterwards, and my father moved to Oklahoma, I guess at that time he didn't feel like taking me with him back to Oklahoma, so he left me in Arizona with some relations, which they had a ranch down in that part of the country. They run cattle in Arizona and Old Mexico, state of Sonora, and I worked for them some of the time in Old Mexica and Arizona both. But I didn't like to stay with them people, I didn't like them, so when I was about sixteen I went to Mexico City, and stayed there some time and came back to San Francisco. When I came to San Francisco, one day I was sitting on the wharf and there was a ship leaving for Australia—they wanted—they was short a deck-boy, and they asked me if I wanted to take the job,

I told them "yes" I did, I didn't have nothing to do at the time, and so in a few minutes I was aboard the ship and on my way to Australia. When we got there, I lost the boat and the American Consul at Sydney, sent me back to San Francisco some time later. On my arrival at San Francisco, I happened to get into a little trouble and I was sent to San Quentin for six years.

Q. What educational facilities did you have, and what education did you get?

A. All the education I have obtained in the penitentiary at San Quentin. I never went to school in my life.

Q. Did they have a school?

A. At San Quentin? For the prisoners, yes.

Q. And you got your education there, did you?

A. I got my education at the penitentiary. I never had any home, nobody to do anything for me.

Q. Where did you go from there?

A. Oklahoma, to look for my dad. I had thought about my father in Oklahoma, and I would like to see him, and when I got in Oklahoma, I got in trouble again, and never [fol. 108] did get to see him. I run away from the Reform School in Oklahoma, and when I run away of course I didn't want to look for my dad and I came out here to the State of Oregon.

Q. And where were you going when you got into the the trouble you are in for?

A. Why me and the fellow that was with me at the time we were going to Yakima to go to work, and at that time, it was early in the spring, and we didn't have no money, either one of us, and when the train stopped at Echo, or Pendleton, we got off, and we got off right in front of a warehouse, and we were both hungry, so we seen on the warehouse where it said "flour mill," and the boy I was with suggested we get a sack of flour and make ourselves some hot cakes, it was down close to the stock yards, and there was lots of cooking utensils, so we did break in to get the sack of flour, but we never did get the flour, they caught us right in the warehouse.

The Court: That is already in the record.

Judge King: Yes, that is in the record. You can pass that up. And then what happened, if anything, after you were arrested and taken to jail?

A. I was given seven years.
Q. Before you were sentenced?

Mr. John Carson: You have been all over that.

[fol. 109] FURTHER EXCERPTS FROM THE TESTIMONY OF ELLSWORTH KELLEY

Examination by Judge King:

Q. You are one of the three charged with Willos and Tom Murray, I believe?
A. I am.
Q. And were with them on the day of the alleged escape of August 12th?
A. I was.
Q. Did you participate in the escape on that occasion?
A. I did.
Q. What was the first thing you did in the way of making your escape on that day?
A. Well, the first thing I did was to cut a hole through the roof.
Q. Who assisted in that?
A. James Willos.
Q. Well, now you may proceed and tell what took place in the way of getting out of the building at that time, and on to the ground, in relationship to the building, in which the building is situated?
A. Murray was the first one down the rope, Jones was the next after they had reached the ground, I started, myself, and Willos last. Immediately upon reaching the ground I was accosted by someone, Guard Peter White.
Q. Just talk to the jury.
A. He commanded me to throw up my hands, which I also did, then Willos having reached the ground, he was also commanded likewise and he complied. I told Pete White, the guard that had us, that I didn't believe such a thing was possible, such as was taking place, I had no knowledge of any intentions whatever to such an occurrence. I was covered by the guard on Number 1 tower, also Number 7 tower, for awhile. Some of the guards on the outside of the prison fence were calling to the guards to shoot, but

owing to the danger of striking Pete White, the guard who was watching us, who was close by us also, they didn't dare to fire under those conditions. The next that I remember was Tom Murray and Oregon Jones coming out of [fol. 110] the prison turnkey's office, Murray throwed a revolver in the direction of Willos and told him to come on. I followed them toward the oak tree which was in the direction of Number 1 tower where there was an exchange of shots in the general direction of Number 1 tower. After mementarily stopping, they proceeded on up the steps through the tower Number 1, and after they had succeeded in doing so, I followed up, also. As I went up the steps, my foot slipped, and fell mementarily on the ground and almost immediately I regained my feet and went on through tower Number 1. As I reached the wall, the platform, as I was going through Tower Number 1, I looked down on the ground I saw Jones with a shot gun shooting in the general direction of the garage, probably a little to the left or right, but in the general direction of the garage. I stood there mementarily and Jones said "he hit me," whether he was talking to himself or anyone else—he hollered "he hit me" and swung around to his right and shot Guard Holman that was lying on the ground. I do not know whether he done it intentionally or premeditately, that I can not say, neverthelss he did it while I was standing on the platform above him. He slipped down in a sitting position, dropping his shot gun, and I jumped down and started a few steps in the direction of Number 2 tower along the ground. Jones called to me and I turned back a step or two or three, I had went but a few feet and shook hands with him, and he said "take my gun, you will need it for an automobile" he said "in case you do not catch up with the other boys you will have to have one" he said "it is empty but it will do all right to hold up a car to get away on." I took the shot gun, and has been testified I proceeded in the direction of the asylum where I overtook Tom Murray and James Willos. After that we commandeered the car and went as is already known in the vicinity of the Willard school-house where we made our camp until after dark. After we had gone a mile or so in a general northerly direction, I took my shot gun and placed it under a log, to the side and under which we covered thoroughly with

dirt and other rubbish and decayed matter thoroughly. Some days later we reached Monitor, where we held up a pool-hall, took the four occupants that were there at the time, put them in a car and drove with them to New Era, where we took possession of Mr. Newman's residence, where him and his family were located. We took the four Monitor men with us and stayed there during that day until [fol. 111] night fall. Then we took one of the Newman boys and one of the men from Monitor and proceeded with them into Portland, where we turned them loose at a suburb called Kenton. We took the cartridges out of the rifles and handed them the rifles—or rather laid them in the car and told them they could have them to do whatever they wanted to with, we was done with them, and we didn't know what they would do with them but we had already throwed the cartridges away when we left them. Then we proceeded, as is known, out of Kenton, on a freight train into Hood River and eventually to Fall Bridge, which is across on the Washington side. We walked across the railroad bridge near The Dalles, and we turned back and came back as far as White Salemon where Murray left us. Willos and I next day, hid out in the hills part of the time, and part of the time by the river, and that night we walked into a little place called "Bingen," and being without proper clothes or provisions, we broke into a grocery store, also taking a car that was left outside in the open, next to a house, evidently there being no garage at the place, which was an Overland automobile. We took the car to the other side of the little town and left it there and walked back where we took the provisions and stuff from the grocery store and carried them to the car and proceeded to the place where we was captured late the next afternoon by the Portland authorities. The rest of the story has more or less been heard.

Q. Now, Mr. Kelley, as you came down the rope and met Mr. Carey was it, or Mr. White, I get those names mixed?

A. White, Pete White.

Q. How did you get away from White, did you break away, or how?

A. Well, he was the one to leave. He left through fear of Jones and Murray.

Q. And left you alone then with Murray and Jones, is that it?

A. He left Willos and I.

Q. Did you go, either you or Willos, go to the turnkey's office?

A. No, we did not.

Q. Did you go back into the building at all?

A. No, sir.

Q. Did you make any effort to get a gun at that time?

[fol. 112] A. No, sir.

Q. Did you get a gun at that time?

A. No, sir.

Q. Did you at any time have a gun in your possession before you went over tower Number 1?

A. I did not.

Q. Did you at any time use a gun?

A. I did not.

Q. Or attempt to use one?

A. I did not.

Q. Did you see Willos use one?

A. I did not.

Q. Were you ahead of Willos?

A. I was behind him.

Q. Behind Willos?

A. Yes, sir.

Q. Now before, or at any time during this escape, was there any understanding on your part that any lives were to be taken or any intention to take lives?

A. Absolutely none whatever.

Q. What was your plan of escape in that respect?

A. As far as I knew, as far as I understood conditions and plans, I expected to go through the front gate, while some of the trusties were going in and out.

Q. Was there any understanding that you were to get any guns in order to get through there?

A. No, sir.

Q. When were you first apprized of any plans of escape by Jones or Murray?

A. Well, Jones told me of their final intentions of trying a break about a week or so before we went.

Q. Did he tell you anything to the effect that they were to go in the turnkey's office?

A. No, he told me that if we couldn't get through the front gate, he would go in and get—with a knife, and get the [fol. 113] men that were in the turnkey's office and bring them through the front gate, and I tried to talk him out of such contentions as I knew it would fail nine times out of ten.

Q. Did he disregard that advice?

A. Yes, he seemed to.

Q. Now after you got into the tower what did you see there?

A. When I got into Tower Number 1, I saw a man lying there which I remembered later was Mr. Sweeney, the guard that was killed in Tower 1.

Q. Did you see Holman there?

A. I saw the man which was later proved to be Mr. Holman on the ground outside the wall.

Q. How near did you go to Holman?

A. The nearest I was to Holman was several feet, I couldn't say, but approximately a yard or so.

Q. Was that about the point you landed on the ground when you went over the wall?

A. No, I kind of jumped off the wall down by Jones, more of a jump than anything else I would call it.

Q. Was Jones alive then?

A. Jones was alive.

Q. Did he do any shooting after that, that you observed?

A. No after I got down on the ground, no, sir.

Q. What did you see him do before that, how many shots did you see him fire before you got on the ground, if any?

A. Well, I seen him fire several shots, at least one, I remember directly in the general direction of the gaarge, while I was up on the wall.

Q. Do you remember whether there were any shots coming from the garage to where you were?

A. Well, after I reached the ground, I heard them striking close to me, as I remember, as I ran along the wall.

Q. Were you struck by any shots?

A. No.

Q. Was any others struck by any shots to your knowledge?

A. Tom Murray was struck—I don't believe he was struck after he reached the tower.

[fol. 114] Q. You don't know just where he was struck, where he was when he was struck?

A. Not in an absolute manner.

Q. Did you see Willos with a gun while you were in the yard?

A. Yes, I seen him take the gun that Murray threw him.

Q. Did you see him do any shooting?

A. No, I didn't see him fire it.

Q. If he fired, then it was without you having observed it?

A. Yes, sir.

Q. Did you see Murray fire?

A. Yes, I seen Murray fire in the general direction of Number 1 tower.

Q. Where was he then?

A. He was standing directly behind the large oak tree that stands betwen Number 1 tower and the administration building.

Q. Where was Jones at that time?

A. Well, he was in the vicinity, but I couldn't tell for sure whether he was directly behind the tree or a little off to the side or back, he was in the vicinity of the oak tree when I saw him.

Q. And what was he doing?

A. He was shooting.

Q. In what direction?

A. Toward Number 1 tower.

Q. Who, if you know, was the first to go up the tower?

A. I do not know.

Q. Did you start to go up ahead of them or afterwards?

A. I was considerably behind the third one.

Q. Now how long did you remain near where Jones was?

A. Well, I proceeded to go through tower Number 1 out on the platform where I saw Jones shooting in the general direction of the garage as stated, and all of a sudden he said "they got me", or words to that effect and swinging around, he shot Holman who was sitting on the ground with his back——

Q. How far was he from Holman?

A. I imagine in the neighborhood—oh about six to ten [fol. 115] feet approximately, I didn't notice during my excitement just how far.

Q. Was he standing when that happened?

A. Jones was standing, yes.

Q. Then what happened to Jones, if anything?

A. Jones sat down, kind of half fell and half sat, he had pretty good control of himself under the conditions.

Q. After you went over the wall, did you have any conversation with him?

A. A few words, I started up the wall a step or two and he called to me and held up his hand and I retraced my steps and shook it, shook his hand and he said "tell the boys to be careful"——

Q. Then what did he do?

A. He said "take my gun and get you a car, it is your only chance to get away, and it will probably come in handy" he says, "it is empty, but nevertheless it will do just as well under the conditions."

Q. Then you started down the wall, did you?

A. Yes, sir.

Q. About how far ahead were the other boys by that time?

A. Well——

Q. The other defendants?

A. Well, I should judge, off hand, they were pretty near to the corner, by the time I jumped off the wall, I didn't notice where they were.

Q. You didn't see them?

A. I didn't take notice of them how far they were.

Q. Did you see them when you first started?

A. I seen them on the ground when I first reached the platform after going through Number 1 tower.

* * * * * * *

Q. Where have you spent your boyhood days; just give an account of where you lived and what you have done up to the time you were involved in the trouble which took you to the state prison?

A. Well, in brief account, I will state I was born in Wisconsin, and lived in the state of Iowa until I became sixteen years of age, when my parents moved to Grants Pass, Oregon, I going with my mother and two sisters and [fol. 116] my niece.

Q. Where did you go then?

A. Well, we lived in a little house in Grants Pass part of the winter, the latter part of 1911, when we moved out to the hills, about eight miles out of Grants Pass.

A. Now you may state whether at any time during your life time prior to this occasion when you came to the Oregon State prison, if you met with any serious accidents on any occasion when you were seriously injured, if so, state what it was?

A. Well, the most effective injury I can recall was—occurred in Boone, Iowa, in the early part of 1923.

Q. What occurred on that occasion?

A. Well, I had a severe fall, striking the back of my head which rendered me unconscious.

Q. For how long were you unconscious?

A. A few minutes.

Q. What age were you then?

A. I was seventeen years of age.

Q. Did you notice any material change in your health after that time?

A. Well, I have been in a very poor state of health practically ever since, as I have been afflicted continuously with severe headaches.

Q. You say continuously, you mean frequently?

A. Frequently—very frequently.

[fol. 117] Reporter's certificate to foregoing omitted in printing.

[fol. 118] In Circuit Court of Lane County

State of Oregon, Plaintiff,

vs.

Tom Murray, John Doe (true name Eddie Walker) & Richard Roe, Defendants

Judgment and Sentence as to Defendant Tom Murray—Filed December 31, 1923

Now at this time this matter comes on to be heard, the State of Oregon, represented by C. N. Johnston, District Attorney, and the defendant Tom Murray present in per-

son, and said defendant having been duly arraigned thereon, and now at this time having duly entered his plea of "guilty" of said crime as charged in said indictment, and at this time having requested that time for sentence be waived, and that the same be imposed at this time, and now the Court being fully advised, it is

Now therefore considered, ordered and adjudged that said defendant Tom Murray be imprisoned in the state penitentiary of the State of Oregon for a maximum term of not to exceed *yen* years in accordance with the statutes of the State of Oregon in such case made and provided, and that he pay the costs of this prosecution.

And it is further considered, ordered and adjuged that the sentence and judgment herein imposed shall not run concurrently with the sentence imposed at this date upon the said defendant, upon a charge of "assault with a dangerous weapon" but that this judgment shall be cumulative and shall commence to run from the date of expiration of said sentence upon the charge of "assault with a dangerous weapon."

Dated at Eugene, Oregon, December 31, 1923.

G. F. Skipworth, Circuit Judge

[File endorsement omitted.]

[fol. 119] Clerk's certificate to foregoing paper omitted in printing.

[fol. 120] In Circuit Court of Umatilla County

State of Oregon, Plaintiff,

vs.

James Willos and George Carlson, Defendants

Change of Plea and Sentence

Judgment and Sentence as to Defendant James Willos—April 11, 1924

Now on this day this cause coming on to be heard upon the application of the defendant James Willos, to be allowed to change his plea heretofore entered herein, the

State of Oregon appearing by R. I. Keater, District Attorney, and the defendant James Willos, appearing in person and in custody of the sheriff of Umatilla County, Oregon, and the defendant having asked in open court that he be allowed to withdraw his plea heretofore entered herein and enter a new plea at this time, which request was by the Court granted; whereupon the defendant James Willos entered the following plea, towit, I plead guilty to the crime of larceny in a dwelling, as charged in the indictment, which plea was duly entered herein.

And the defendant having waived time for the passing of sentence upon him and having asked that sentence be now passed, and thereupon the Court asked the defendant if he had anything to say why sentence should not now be passed upon him, and said defendant having shown no sufficient reason why sentence should not at this time be passed upon him, and the Court being fully advised in the premises,

It is considered ordered and adjudged by the Court that the defendant James Willos be confined in the penitentiary at Salem, Oregon, for a period without limitation of time the maximum of which is fixed at (7) seven years, and that [fols. 121 & 122] the State of Oregon have and recover of and from the defendant its costs an disbursements in this case, taxed at $— Dollars, and that execution may issue therefor.

Gilbert W. Phelps, Circuit Judge.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 123] In Circuit Court of Marion County

Order Settling Bill of Exceptions

The foregoing Bill of Exceptions consisting of 75 pages, was tendered to the Court for signing and filing on the — day of December, A. D. 1925, within the time allowed by order of the Court. The said bill of exceptions contains a true and correct transcript of excerpts of testimony offered, rulings objected to, and exceptions allowed by the Court at the trial.

The exhibits attached, namely: State's exhibits Numbers 10, 13, 15, 20, 20 B, 25 and 26 A, are the originals of such exhibits offered and received in evidence over the objection of counsel for the the defendants, and the copies of exhibits attached, namely: State's exhibits 16, 17 and 21, are copies of the originals of such exhibits offered and received in evidence over the objection of counsel for defendants, as noted in the foregoing bill of exceptions, and the several excerpts of testimony attached to and made a part of this bill of exceptions are true and correct excerpts of that portion of the testimony and evidence offered and received at the trial which they purport to be.

In no case and in no exception as set forth in the foregoing bill of exceptions, does the whole testimony of any witness named therein appear; and the said bill of exceptions, is signed and settled this — day of December, A. D. 1925.

The foregoing bill of exceptions is to the best recollection of the undersigned a substantial copy of the lost bill and is supplied in accordance with the order of the Supreme Court in this cause dated April 8, 1926.

Percy B. Kelly, Judge.

Dated at Salem, Oregon, April 9, 1926.

[File endorsement omitted.]

[fol. 123a] IN SUPREME COURT OF OREGON

STATE OF OREGON, Respondent,

vs.

ELLSWORTH KELLEY and JAMES WILLOS, Appellants

Appeal from Marion County

ORDER ALLOWING FILING OF SUBSTITUTED BILL OF EXCEPTIONS

This cause coming on to be heard upon motion of the attorney for the defendants for filing of a substituted transcript and for substituted bill of exceptions in the above cause, it appearing that the original bill of exceptions has

been lost, and that it will be necessary to substitute copies thereof,

It is ordered that this matter be referred to the trial judge with directions that he examine the alleged copies of the bill of exceptions now in possession of counsel and examine and correct the same as near as possible in accordance with the original bill of exceptions and certify the same to this court.

[fol. 123b] Clerk's certificate to foregoing paper omitted in printing.

[fol. 124] [File endorsement omitted]

IN SUPREME COURT OF OREGON

[Title omitted]

PETITION FOR DIMINUTION OF RECORD AND AFFIDAVIT THERETO —Filed May 29, 1926

Come now the appellants by their attorneys, Will R. King and Martin L. Pipes, and suggesting a diminution of the record in this cause, respectfully show to the Court:

1. That on the 28th day of May, 1926, the appellants filed in the Circuit Court of the State of Oregon for the County of Marion, from which court this appeal is taken, a motion, of which a copy duly certified by the clerk of said Circuit Court is attached hereto and made a part hereof.

2. That the said motion came on for hearing before the said Court and the said Judge thereof, Honorable Percy R. Kelly, these petitioners and appellants appearing by their attorneys, Will R. King and Martin L. Pipes, and the State appearing by John H. Carson, District Attorney of said County, and the said District Attorney then opposed the allowance of said motion, and the said Court and Judge Percy R. Kelly, judge thereof, stated from the bench and to counsel that he did not have jurisdiction to allow said motion, as the allowance thereof would not be an amendment of the Bill of Exceptions, but further stated that he

would certify that the copy of instructions presented to him at said time was a true copy of all the instructions given to him on the trial of appellants in said Circuit Court, if upon examination thereof he found them to be correct. But the said Court and Judge refused to incorporate in his order made on said motion his said statement that he would certify said instructions if found correct. And thereupon the said Court and Judge made and entered upon said motion of these petitioners an order, a copy of which, certified by the Clerk of said Circuit Court, is attached hereto and made a part hereof.

[fol. 125] 3. That thereafter, on the same day, the said Judge after examining the presented instructions, certified the same and delivered them to counsel who filed them with the Clerk of the said Court of Marion County, where they are now on file. That a copy of the said instructions, together with the certificate of the said judge is attached to this petition and made a part thereof.

4. That the said John H. Carson, District Attorney of the said county, disputes the right of appellants herein to have filed in this court the said instructions so certified by the said Judge, or to have them considered by this Court as an amendment to the Bill of Exceptions; that your petitioners allege that in their opinion the said instructions are properly an amendment to the Bill of Exceptions and entitled to be filed in this Court as a part of the Bill of Exceptions to present the matters relied on by your petitioners in this cause.

5. That the briefs of the appellants in this Court allege error in refusing to give certain instructions and the said instructions so certified are necessary to rebut the presumption that equivalent instructions were given by the Court; besides your petitioners are advised that the said instructions, although not excepted to or the exceptions assigned as error, involve matters that can not be waived by your petitioners and that they are within the power and jurisdiction of this Court to decide.

Wherefore, your petitioners pray that an order be made directing the Clerk of the Circuit Court of Marion County to certify whether or not there are on file in the said Court instructions given in the above entitled case, together with

the certificate of the Honorable Percy R. Kelly, Judge thereof, and if so, to certify to this Court that fact, together with the (of the) instructions including the said certificate.

Will R. King, Martin L. Pipes, Attorneys for Appellants.

[fol. 126] STATE OF OREGON,
County of Marion, ss:

I, Martin L. Pipes, being first duly sworn, depose and say: That there is to my knowledge on file in the Circuit Court of the State of Oregon for Marion County, a copy of the instructions given by the Judge of said Circuit Court at the trial of the petitioners herein; a copy of which instructions, together with the certificate of the judge thereto, appears attached to the foregoing petition, and the said instructions are not in the Bill of Exceptions filed herein.

Martin L. Pipes.

Subscribed and sworn to before me, this 29th day of May, 1926. Arthur S. Benson, Clerk Supreme Court of Oregon. (Seal.)

[fol. 127] IN CIRCUIT COURT OF MARION COUNTY

[Title omitted]

MOTION TO AMEND BILL OF EXCEPTIONS—Filed May 28, 1926

Come now the above named defendants, by their attorneys, Will R. King and Martin L. Pipes, and present to the court a copy of the instructions of the Court to the jury in the above entitled case on trial, and move the Court to incorporate the said instructions in the Bill of Exceptions in the Supreme Court by amendment, and that the amendment to the Bill of Exceptions so made shall be certified by Honorable Percy R. Kelly, Judge of the said court, presiding at said trial, to be a copy of the instructions given to the jury on the trial of the said case.

That when the original Bill of Exceptions was prepared and *and* signed by the Judge of the said court, the said instructions were inadvertently omitted by counsel, and that

the instructions are necessary to be in the Bill of Exceptions in the Supreme Court in order that the defendant appellants may have the benefit of the errors of law relied on, and to rebut any presumption of the Supreme Court that the instructions which were refused are contained in the instructions given. And the said counsel here present with this motion a copy of said instructions.

Martin L. Pipes, Will R. King, Counsel for Defendants.

[fol. 128] State of Oregon,
County of Marion, ss:

Service of the within motion is hereby accepted in Marion County, Oregon this — day of May, 1926.

John H. Carson, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 129] In Circuit Court of Marion County

[Title omitted]

Order Denying Motion to Amend—March 28, 1926

Upon the motion of the defendants filed in this cause to incorporate the instructions in the Bill of Exceptions in the Supreme Court, by amendment, and that the amendment to the Bill of Exceptions so made shall be certified by the Honorable Percy R. Kelly, Judge of said court, pertaining to said decision, to be a copy of the instructions given to the jury on the trial of said case;

The defendants appearing by their counsel Will R. King and Martin L. Pipes, and the State of Oregon appearing by John H. Carson, District Attorney of the State of Oregon for Marion County; and the Court having heard the said motion, and having considered the same, it is hereby ordered that The said motion be and the same is hereby denied.

[fol. 130] State of Oregon,
County of Marion, ss:

I, U. G. Boyer, County Clerk of the above named County and State and ex-officio Clerk of the Circuit Court of the

County of Marion, State of Oregon, do hereby certify that the foregoing copy of Motion to amend the Bill of Exceptions and Order In Re: The State of Oregon vs. Tom Murray, Ellsworth Kelly, and James Willos, #17778 has been by me compared with the original and that it is a correct transcript therefrom and of the whole of such original records or file as the same appears of record or on files in my office and in my care and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, this 28th day of May A. D. 1926.

U. G. Boyer, County Clerk, by W. S. Lamkin, Deputy.
(Seal.)

[fol. 130a] In Supreme Court of Oregon

[Title omitted]

Order Granting Motion for Leave to File Instructions Given by Trial Court—May 28, 1926

Come now the appellants by their attorneys Will R. King and M. L. Pipes, and present their motion for leave to file herein the instructions given by the trial court in this cause, and the respondent appearing by John H. Carson, District Attorney opposing such motion, and the court having heard the argument of counsel and now being fully advised, it is ordered that appellant's motion for leave to file herein the instructions to the Jury given by the Court below, be allowed, and it is further ordered that the respondent be allowed to file the entire evidence and record in the case if so desired.

[fol. 130b] Clerk's certificate to foregoing paper omitted in printing.

[fol. 131] In Circuit Court of Marion County

[Title omitted]

Court's Instructions to Jury

Ladies and Gentlemen of the Jury: It now becomes my duty to instruct you upon the law applicable to this case,

and it is your duty to follow, observe and be guided by the law as I state it to you. It is not for the jury to say that the law is one thing or another, but the jury are the exclusive judges of the effect and value of the evidence. It is not for the judge to say that this, that or the other disputed fact has or has not been proven, or to give any intimation or suggestion along that line. Briefly, the law is for the judge to declare and the facts are for the jury to determine.

The defendants Ellsworth Kelley, James Willos and Tom Murray are charged in the indictment on file herein with the crime of murder in the first degree. The defendants, Ellsworth Kelley and James Willos, only, are upon trial.

The charging part of the indictment is as follows:

"The said Tom Murray, Ellsworth Kelley and James Willos, on the twelfth day of August, 1925, in the County of Marion and State of Oregon, then and there being did then and there unlawfully, feloniously, purposely and of deliberate and premeditated malice, kill one John Sweeney, by shooting him, the said John Sweeney, with a pistol, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon."

To this indictment, the defendants on trial, Ellsworth [fol. 132] Kelley and James Willos, have entered pleas of not guilty, thus putting in issue every material allegation contained in the indictment.

While the indictment charges that the alleged crime was committed upon the twelfth day of August, 1925, the State is not held to strict proof as to the time of the alleged offense. If it appear that the crime charged or the lesser crime included in the indictment was committed at any time prior to the finding of the indictment, which finding of the indictment transpired on the 28th day of August, 1925, as far as the time of the alleged offense is concerned, that would suffice.

The crime charged is murder in the first degree. The statute of this state prescribes that if any person shall purposely and of deliberate and premeditated malice, or in the commission or attempt to commit, rape, arson, robbery or burglary, kill another, such person shall be deemed guilty of murder in the first degree.

The statute of this state also prescribes that if any person shall purposely and maliciously, but without deliberation and premeditation, or in the commission or attempt to commit any felony other than rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the second degree.

Murder in the first degree is where one purposely and of deliberate and premeditated malice kills another, or where one in the commission of or in the attempt to commit rape, arson, robbery or burglary, kills another.

Murder in the second degree is where a person purposely and maliciously, but without deliberation and premeditation, kills another, or where a person in the commission or attempt to commit any other felony than rape, arson, robbery or burglary, kills another.

[fol. 133] The difference between murder in the first degree and murder in the second degree is this:

There must be deliberation, premeditation and malice to constitute murder in the first degree, unless the killing is done in the perpetration of a rape, arson, robbery or burglary, while premeditation and deliberation are not necessary to constitute murder in the second degree; and if the killing is done without premeditation and deliberation, in the commission of any felony other than rape, arson, robbery or burglary, it is murder in the second degree; or, if the killing is done without premeditation and deliberation, but purposely and maliciously, it is murder in the second degree.

In order to constitute murder in the first degree, where the killing is done in the perpetration of a rape, arson, robbery or burglary, it is not necessary to prove expressly either a purpose to kill or deliberate and premeditated malice.

Robbery is the felonious taking of property from the person of another by force. The personal possession of the property by the party robbed may be actual or constructive. If the property is in his presence and control though not on his person, it is sufficient. If a man knocks another down and takes from him property so in his presence and control, it is robbery. This is the well established rule of law. There must be an actual taking and carrying away. Such actual taking and carrying away being necessary to

the robbery is a part of the robbery; and while those engaged in the criminal enterprise are in the act of so carrying away, they are in the act of robbery. But such carrying away must be from the person, actual or constructive, that is, it must be the same carrying away by which the goods were removed from the immediate presence of the owner or person in custody thereof. If there has been no [fol. 134] interruption or delay in the removal, no putting down of the goods, no intervention of another act inconsistent with the carrying away; if the removal was continuous, uninterrupted and near in point of time and place to the act of violence; if there has been no opportunity to secrete or secure the fruits of the robbery, and while in such act of carrying away of the property thus taken, the robber or robbers shoot and kill a person in the manner alleged, it is murder in the first degree. It is sufficient if it be proven that the taking by the robber was actually begun in the presence of the party robbed, though it was completed in his absence. The taking is not necessarily concluded by the removal of the goods beyond the presence of the owner or rightful custodian thereof. It may be concluded away from and at a distance from his presence.

When a person takes with force or violence the goods of another or goods which are under another's rightful custody and control from the person or presence of the owner or person in the rightful custody and control thereof and against his will, the person so taking them has committed robbery. It constitutes robbery so far as to render the perpetrator liable to conviction for it; but the act of robbery itself may be prolonged beyond the time when that liability is fixed. The asportation, that is the carrying away of the goods, is a necessary ingredient of the robbery, as essential to complete the crime as the violence to the owner or person in control and custody of the property, or as the seizure itself; and, if during such asportation or carrying away of the fruits of robbery and in order that the carrying away be successfully accomplished, the robber kills another person, he is guilty of murder in the first degree.

Where the killing, if any, is not done in the perpetration of a rape, arson, robbery or burglary, in order to con- [fol. 135] stitute murder in the first degree, it must appear

that such killing was committed purposely and of deliberate and premeditated malice.

By the word, purposely, is meant that there must be a specific intent to kill intentionally executed. The term malice, imports a wish to vex, annoy or injure another person, established either by proof or presumption of law.

Premeditation means carefully considered and thought of before hand, but no particular length of time is necessary to meditate upon such act provided the purpose to take life is fully settled and determined upon by the defendant in cool blood before the commission of the act.

Deliberation is of the same general significance as premeditation. In short, it is prolonged premeditation, the doing of an act in cool blood and upon consideration.

Unless the killing was effected in the commission or attempt to commit rape, arson, robbery or burglary, there must be some other evidence of malice than the mere proof of the killing in order to constitute murder in the first degree; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait or some other proof that the design was formed and matured in cool blood and not hastily upon the occasion. You will not understand, however, from this rule of law that it is necessary either to prove poison or lying in wait in this particular case, but there must be proof satisfactory to your minds that the killing if any was committed with deliberate and premeditated malice in order to constitute murder in the first degree unless it was committed in the commission or attempt [fol. 136] to commit the crime of robbery.

Deliberation is that act of the mind which examines and considers whether a contemplated act should or should not be done. Premeditation is where the intention to do an act has been formed before the attempt to execute it. It implies a prior intention to do the act in question. Direct proof of deliberation and premeditation is not required, but may be inferred from proven facts; but before you can say that deliberation and premeditation existed, you must be able to so find from the evidence, and it must be a finding established beyond reasonable doubt. There is no length of time fixed by the law for the premeditation and deliberation necessary to make an offense murder in the

first degree which would otherwise be murder in the second degree, but the evidence must show that the design was formed in cool blood and not hastily upon the occasion.

For the purposes of this case, to constitute murder in the first degree, unless committed while in the commission or in the attempt to commit robbery, it is necessary that the design to take life be formed and matured in cool blood and not hastily upon the occasion; and it must be the result of a deliberate and premeditated act in pursuance of a design formed and matured when the perpetrator was master of his own understanding and after time and opportunity for deliberate thought. A design to kill formed in the midst of a conflict, when reason is obscured by passion, does not make homicide murder in the first degree. By cool blood is not meant that a party must be wholly unprejudiced and in a philosophic state of mind, but he may be actuated by some grudge or ill will toward the deceased, and yet may act and deliberate in cool blood, but the deliberation and premeditation must have arisen while the understanding was clear, and the slayer master of his [fol. 137] passion and temper, and the design must not have been formed hastily upon the occasion; but if, after the mind conceives the thought of taking life, the conception is meditated upon and a deliberate determination formed to do the act, then no matter how soon the fatal resolve is carried into effect, it is murder in the first degree. The question is, not how long the slayer deliberated and premeditated, but did he deliberate and premeditate at all. The jury, however, would have a right to consider the length of time of the occurrence transpiring as shown by the evidence, to determine whether or not the slayer, if any, in this case, deliberated and premeditated.

To constitute murder in the first degree, it is not necessary that the deliberate intent to kill should have been formed for any specific length of time prior to the commission of the act, but it is enough if it existed at the moment of the killing, provided that it was formed when the mind was in its normal state, under the control of the slayer, and not in the heat of passion; and the question of whether or not there was premeditation and deliberation is a question of fact for the jury alone to decide.

For the purposes of this case, the material and necessary elements of murder in the first degree are as follows:

1. The killing of the person named in the indictment in this case, namely, John Sweeney.

2. Either that John Sweeney was killed purposely and of deliberate and premeditated malice, or that John Sweeney was killed while the one or ones who did the killing were committing or attempting to commit the crime of robbery.

3. That the defendants, Ellsworth Kelley and James Willos, committed the crime by acting in pursuance of a conspiracy in concert with, or by aiding, abetting and assist-[fol. 138] ing the person who shot and killed John Sweeney, if said John Sweeney was shot and killed.

4. That the alleged death of said John Sweeney, was the result of him, the said John Sweeney, being shot with a pistol.

5. That the alleged homicide, that is, the killing of John Sweeney, occurred in Marion County, Oregon, and

6. That the said alleged homicide occurred some time prior to the 28th day of August, 1925.

For the purposes of this case, the material and necessary elements of murder in the second degree are as follows:

1. The killing of John Sweeney.

2. Either that said John Sweeney was killed purposely and maliciously, but without premeditation and deliberation, or in the commission or attempt to commit any felony other than rape, arson, robbery and burglary.

3. That the defendants Ellsworth Kelley and James Willos, committed the crime by acting in pursuance of a conspiracy in concert with, or by aiding, abetting and assisting the person who shot and killed John Sweeney, if said John Sweeney was shot and killed.

4. That the alleged death of said John Sweeney was the result of him, the said John Sweeney, being shot with a pistol.

5. That the alleged homicide, that is, the killing of John Sweeney, occurred in Marion County, Oregon.

6. That the said alleged homicide occurred some time prior to the 28th day of August, 1925.

Before you can find the defendants on trial guilty of the crime charged in the indictment, which is murder in the [fol. 139] first degree, or of the lesser crime included therein, which is murder in the second degree, all of the material and necessary elements of such respective crimes must have been respectively proven to your satisfaction beyond a reasonable doubt; and if upon any such material and necessary element thereof, you are not convinced beyond a reasonable doubt, it is your duty to find thereon in favor of the defendants and against the state.

If all the material elements of murder in the second degree have been proven to your satisfaction beyond a reasonable doubt, but upon the entire consideration of the evidence in the light of the instructions of the Court you have a reasonable doubt upon some material element of murder in the first decree not included in the material element of murder in the second degree, and you are not convinced beyond a reasonable doubt that at the time of the alleged killing the defendants were insane, your verdict should be "guilty of murder in the second degree;" but if you have a reasonable doubt as to whether the defendants on trial are guilty of either murder in the first degree or murder in the second degree, your verdict should be "not guilty."

If all the material and necessary elements of murder in the first degree have been proven to your satisfaction beyond a reasonable doubt, and you are not convinced beyond a reasonable doubt that at the time of the alleged killing, the defendants on trial were insane, your verdict should be guilty as charged in the indictment on file herein.

In 1920, the people amended the Constitution of the State, since which time pursuant to such amendment and legislative enactment, in accordance therewith, the penalty of murder in the first degree has been and is death except when the trial jury shall, in its verdict, recommend life imprisonment. If you find by your verdict that the defendants on trial, Ellsworth Kelley and James Willos, are guilty of murder in the first degree, the punishment will [fol. 140] be death unless you expressly recommend in your verdict life imprisonment, in which case the sentence imposed will be imprisonment for life. The right to qualify a verdict of guilty of murder in the first degree by adding

the words: "We recommend life imprisonment" is thus conferred upon the jury in all cases of murder in the first degree. The law does not itself prescribe, nor authorize the court to prescribe any rule defining or circumscribing the exercise of this right, but commits the whole matter of its exercise to the judgment and consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court or jury is of the opinion that there are palliating or mitigating circumstances; but it extends to every case in which, upon a view of the whole evidence, the jury is of the opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, illness if any, or mental impairment, if any, or intoxication, of whatever nature or kind, if any, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the constitution of this state and legislative enactment based thereupon to the sound discretion of the jury, and of the jury alone.

It is necessary for the court to give you the legal definition of a reasonable doubt, because as stated, in order to warrant conviction, the state must establish the guilt of the defendants beyond a reasonable doubt, and for the further reason that in order to establish the defense of insanity as an excuse for the commission of crime, the insan- [fol. 141] ity of the defendants must be proven to the satisfaction of the jury beyond a reasonable doubt. A reasonable doubt is such a doubt as exists in the mind of a careful, prudent and reasonable man or woman, after a full, fair and complete examination and consideration of all the evidence in the case. It must not be a captious or mere possible doubt inconsistent with the evidence which the jury credits and believes.

It is that state of the case which after an entire examination and consideration of all the evidence leaves your mind in such condition that you can not say you feel an abiding conviction amounting to a moral certainty of the truth of

the charge or of the defense of insanity as the case may be. The law does not require absolute demonstration, that is, such a degree of proof as excluding the possibility of error produces absolute certainty, because such proof is rarely possible, moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

The expression, reasonable doubt, means in law just what the words imply, a doubt founded upon some good reason. It must not arise from a merciful disposition or a kindly sympathetic feeling or a desire to avoid performing a disagreeable duty. It must arise from the evidence or lack of evidence. It must not be a mere whim or a vague, conjectural doubt or imagining, founded upon mere possibilities. It must be a substantial doubt such as an honest, sensible and fairminded man or woman might with reason entertain consistently with a conscientious desire to ascertain the truth.

Larceny of property of a greater value than thirty-five dollars is a felony; and if in the commission or attempted commission thereof, a human being is killed by those committing or attempting to commit such a larceny, they would [fol. 142] be guilty of murder in the second degree.

Larceny is the felonious taking of chattels from the owner who has either the actual or constructive possession thereof, with intent to steal the same.

It is the duty of the Warden of the Oregon State Penitentiary to safely keep the prisoners committed to that institution until they are legally discharged; and the guards of the penitentiary should, if possible, prevent escapes by convicts imprisoned there; and to prevent an escape such guards should use all reasonable means even to the extent of killing anyone engaged in such an escape or attempted escape.

It is unlawful and criminal for a prisoner lawfully committed to and confined in the Oregon State Penitentiary to escape or attempt to escape therefrom.

Every person is presumed to be innocent of crime or wrong. This is a disputable presumption and one which may be overcome by evidence satisfying your minds of guilt beyond a reasonable doubt; but this presumption attends the defendants on trial as a species of evidence in their behalf until, if at all, it is overcome by other evidence

satisfying your minds beyond a reasonable doubt that they are guilty of the crime charged or of the lesser crime included therein. Mere suspicion or probability of the guilt of the defendants on trial, however strong, is not sufficient to justify a conviction, nor is it sufficient merely if the greater weight of preponderance of the evidence supports the charge in the indictment or the lesser offense included therein.

If you are not convinced beyond a reasonable doubt that at the time of the alleged killing, the defendants on trial were insane, and you are satisfied beyond a reasonable doubt that they are guilty; but you find that there is a rea- [fol. 143] sonable ground of doubt as to which of the two different degrees of murder they are guilty of, it will be your duty under the law to find them guilty of the lower degree, namely, murder in the second degree.

I instruct you that a conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself unlawful or criminal, by criminal or unlawful means.

When individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one of the conspirators is in legal contemplation, the act of all.

And this mutual, coequal responsibility of each conspirator for the acts of his associates done pursuant to and in furtherance of the common design extends to such results as are the natural or probable consequences of such acts, even though such consequences were not specifically intended as part of the original plan.

This doctrine, however, holding each conspirator liable for the acts of his associates, as well as for the consequences of such acts, is subject to the restriction indicated in the statement of the rule, namely: that it is only for such acts as are naturally or necessarily done pursuant to and in furtherance of the conspiracy, and for the natural or necessary consequences of such acts that a co-conspirator is responsible.

The State contends that the defendants on trial entered into a conspiracy with defendant, Tom Murray, and one Bert Oregon Jones, to escape and aid each other in escap-

ing from the Oregon State Penitentiary, and pursuant to and in furtherance of such alleged conspiracy, the crime alleged in the indictment was committed. This is one of [fol. 144] the issues in this case. The defendants on trial, by their pleas of not guilty have put in issue every assertion or claim made by the State upon which, if proven, guilt may be predicated. Upon all such issues, the State holds the affirmative, and in order to prevail thereupon must establish the truth thereof to your satisfaction beyond a reasonable doubt.

I further instruct you that while it is necessary in order to establish the existence of a conspiracy, to prove a combination of two or more persons by concert of action to accomplish a criminal or unlawful purpose, yet it is not necessary to prove that the conspirators came together and entered into a formal agreement to effect such purpose. Such common design and purpose may be regarded as proved, if the jury believes from the evidence beyond a reasonable doubt that the parties to such conspiracy were actually pursuing in concert the common design and purpose, whether acting separately or together, by common or different means, providing they were all leading to the same unlawful purpose.

A conspiracy to commit crime may be established by circumstantial evidence the same as any other fact, and such evidence is legal and competent for that purpose.

Circumstantial evidence is that which tends to establish the fact in dispute by proving another, and which though true does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence.

All who take part in a conspiracy while it is being formed and all who with knowledge of the facts concur in the plans originally formed and aid in executing them are fellow conspirators. They commit the offense when they become parties to the transaction or further the original plan with knowledge of the conspiracy.

[fol. 145] If the defendants on trial, Ellsworth Kelley and James Willos, and the defendant, Tom Murray, and Bert Oregon Jones, were prisoners duly and legally committed to and confined in the Oregon State Penitentiary as such, and if, while so confined therein as prisoners, the defendants on trial, Ellsworth Kelley and James Willos, con-

spired and agreed together with defendant, Tom Murray and Bert Oregon Jones, to escape and to aid each other in escaping from the Oregon State Penitentiary, by overpowering the turnkey or other officer, if any, in charge of the arsenal thereof, and robbing said arsenal, if any, of the the guns and ammunition, if any, being kept there, and by unlawfully resisting the guards and other officers in charge to the extent of assaulting such guards or other officers with a deadly weapon and taking life if necessary, to effect their escape; and if, in pursuance of such conspiracy and in furtherance of a common object, the defendants on trial aided Murray and Jones, and one or more of the conspirators committed the crime of robbery by assaulting the turnkey by knocking him down and by force and violence taking and stealing from his custody and in his presence, personal property, if any, in said turnkey's lawful charge and control, namely guns and ammunition, and while engaged in the commission of such robbery, if any, one of such conspirators shot and killed John Sweeney with a pistol in Marion County, Oregon, on or about August 12, 1925, and before August 28, 1925, then the defendants on trial, unless they were legally insane at the time, are guilty of murder in the first degree, although neither of the defendants on trial fired the fatal shot which caused the death of John Sweeney.

In determining whether such are the facts, you should bear in mind that you must be convinced beyond a reasonable doubt in order to warrant you in finding that the defendants on trial or either of them did so conspire or agree; [fol. 146] or aid or assist Murray and Jones; or that one or more of the alleged conspirators committed robbery; or that one of the alleged conspirators did so kill John Sweeney; or that the defendants on trial were insane at the time of killing if any.

If the defendants on trial, Ellsworth Kelley and James Willos, and the defendant, Tom Murray, and Bert Oregon Jones, were prisoners duly and legally committed to and confined in the Oregon State Penitentiary as such, and if while so confined therein as prisoners, the defendants on trial, Ellsworth Kelley and James Willos, conspired and agreed together with defendant Tom Murray, and Bert

Oregon Jones, in order to escape and aid each other in escaping from the Oregon State Penitentiary, to steal the guns and ammunition, if any, in the turnkey's office of the penitentiary and to unlawfully resist the guards and other officers in charge to the extent of assaulting such guards or other officers with a deadly weapon and taking life, if necessary, to effect their escape; and, if in pursuance of such conspiracy and in furtherance of a common object, the defendants on trial aided Murray and Jones, and in pursuance of such conspiracy and in furtherance thereof, one or more of the conspirators committed the crime of larceny of property of greater value than thirty-five dollars, but did not commit the crime of robbery, and while in the commission of such crime of larceny, if any, one of such conspirators without premeditation or deliberation, shot and killed John Sweeney with a pistol in Marion County, Oregon, on or about August 12, 1925, and prior to August 28, 1925, then the defendants on trial, unless they were legally insane at the time are guilty of murder in the second degree, although neither of the defendants on trial fired the fatal shot which caused the death of John Sweeney.

Moreover, all persons concerned in the commission of a crime, whether they directly commit the act constituting the [fol. 147] crime, or aid and abet in its commission, are principals and amenable to the law as such.

To abet is to countenance, assist, give aid. The word "abet" includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime.

If you believe from the evidence beyond a reasonable doubt that the defendants on trial in this case, Ellsworth Kelley nad James Willos, advised, aided and abetted or encouraged the killing of John Sweeney, as charged in the indictment, or advised, aided, abetted or encouraged such unlawful acts as caused John Sweeney to be purposely and of premeditated and deliberate malice killed, and as a result of such advice, aid, abetting or encouragement, the said John Sweeney was killed as charged in the indictment, then the defendants on trial should be considered as principals and should be punished accordingly, unless at the time of the killing of John Sweeney, the defendants were legally insane.

The defendants have testified as witnesses in this case, and I therefore instruct you that a defendant in a criminal action is a competent witness in his own behalf; the jury, however, have a right to take into consideration his interest in the result of the trial and all the facts and circumstances of the case and it is their duty to give his testimony such weight as they, in their judgment, think it entitled to.

The law provides that where a statement is made by a person in the custody of an officer, or is made to an officer, such as the district attorney or sheriff or deputy district attorney, such a statement can not be considered as evidence if made either by reason of fear or by reason of a hope of reward; so that before you can consider any of the evidence concerning statements made by the defendants to [fol. 148] the district attorney, deputy district attorney or the sheriff, you must be able to say from a consideration of the evidence that such statements were voluntarily made by the defendants, that they were not induced or persuaded either by hope of reward or fear. If you entertain a reasonable doubt as to that, you should disregard such alleged statements.

While statements made by one conspirator while acting in furtherance of the criminal plan agreed upon are deemed to be the statements of all the conspirators engaged in such conspiracy, any statements made by one of the conspirators after the accomplishment of the purpose for which the conspiracy was formed or after its frustration or final termination, are to be considered only with reference to the conspirator making them, and are not binding upon others who were engaged in the conspiracy unless expressly confirmed and ratified by them.

Applying this rule, you will bear in mind that any statements made by Willos, after his return to the penitentiary, while Kelley was not present, if Willos made any such statements, are not to be considered in determining the guilt or innocence of Kelley or the credibility to be accorded to his testimony; and likewise any statements made by Kelley after his return to the penitentiary, while Willos was not present, if Kelley made any such statements, are not to be considered in determining the guilt or innocence of Willos, or the credibility to be accorded to his testimony.

Under our statute the following presumptions of the law, subject to the limitations that will be hereafter stated to

you, are declared to be conclusive; first, the intention to murder, from the deliberate use of a deadly weapon causing death within a year; and, second, a malicious and guilty intent is presumed from the deliberate commission of an unlawful act for the purpose of injuring another.

[fol. 149] Although the statute declares these presumptions to be conclusive, nevertheless, they are conclusive presumptions only under certain circumstances, and are not always conclusive presumptions.

The law presumes the defendant to be innocent of the crime charged until the contrary is made to appear, but when it is shown that he killed the deceased with a deadly weapon, the general presumption of innocence yields to the specific proof of such homicide, and the law infers that it was malicious, and, therefore, murder, because, as a rule, it is unlawful to kill a human being, and is murder, if not something else, and as special circumstances only will vary the legal fact of homicide so as to relieve it from the character of murder, it is inferred or presumed to be such from the fact of killing, unexplained; but, if the attendant circumstances are shown in evidence, whether upon the part of the State or the defendants, the character of the killing is to be determined by considering them, and it is then not a matter of presumption which operates in the absence of secondary evidence, but it is a matter for determination from the circumstances shown in evidence.

The presumption of an intent to murder incident to the deliberate use of a deadly weapon is, therefore, not always conclusive of the fact, and it is only so when nothing else appears in evidence either to justify or excuse the act. In other words, this presumption is only intended to apply where the mere fact of killing with a deadly weapon, deliberately used, is shown, without any other evidence to modify or otherwise explain the act. Whenever there is evidence of a tendency to rebut the presumption, whether [fol. 150] it come from the prosecution or the defense, it becomes a matter for you, the jury, to consider whether it has been overcome or is of weightier significance so as to turn the scales of justice, and you, the jury, must determine from the evidence in the case whether the State has established the guilt of the defendants beyond a reasonable doubt.

The defendants are deemed innocent until they are proven guilty. This is a disputable presumption of law, made so by the statute. The ultimate question for the jury to decide is whether, in view of all of the facts shown, the defendants have been proven guilty. Therefore, the presumption of law following the deliberate use of a deadly weapon and the presumption of law following the deliberate commission of an unlawful act for the purpose of injuring another, may be rebutted the same as any other presumption deducible from the facts in evidence that the law does not make indisputable.

There is a further limitation on the rule that the law presumes malice from the deliberate and unlawful use of a deadly weapon causing death within a year, which is that the law does not conclusively presume that the killing under such circumstances is murder in the first degree, or in any degree. The law does not presume the degree of the offense from the mere fact of the deliberate unlawful use of a deadly weapon. A deadly weapon is one by the use of which death or great bodily harm may be inflicted, and as a matter of law the pistols and shot gun introduced in evidence, when loaded with powder and ball, and capable of being discharged within certain distance, are deadly weapons.

[fol. 151] Evidence tending to disclose the mental condition and capacity of the defendants on trial at the time of the alleged commission of the crime charged in the indictment having been given, it becomes necessary to instruct you in regard to the defense of insanity.

This is a perfectly legal and proper defense to interpose and it is your duty under your oaths to give to the evidence upon this branch of the case, the same careful consideration that is required of you as to the other portions of the case.

The law presumes every man to be sane, until he establishes in the mind of the jury beyond a reasonable doubt the fact of his insanity. In other words, the burden is upon the party claiming insanity as a defense, to make out that defense beyond a reasonable doubt; and if you have any reasonable doubt as to whether the defendants at the time of the commission of the alleged homicide, if they did commit it, or participate in its commission, were sane or in-

sane, the State is entitled to the benefit of such doubt, and you should reject such defense.

Insanity, to excuse crime, must be such a disease of the mind as dethrones reason and renders the person incapable of understanding the nature, quality and consequences of his act or of distinguishing between right and wrong in relation to such act.

It is not every eccentricity of mind, however well established that will excuse the commission of an act otherwise criminal.

If a party, notwithstanding some mental disease or infirmity, still has reason enough to know that the act which he proposes to commit is wrong and unlawful, knows the nature and quality of the act, has the power of deliberation [fol. 152] and premeditation, the power to do or refrain from doing the act charged as a crime, such mental disease or infirmity will not avail as a defense. In other words, while the law will not punish a person for an act which is the result of or produced by mental disease or infirmity, it will punish him for an unlawful act not the result of or produced by or influenced by mental disease, even though some mental unsoundness or infirmity is shown to have existed. In its legal sense, insanity is a defect or disease of the mind which renders a person incapable of entertaining a criminal intent.

The law recognizes partial as well as general insanity, that is, that a person may be insane upon one or more subjects, and sane upon others; but the same rule applies to both kinds of insanity. Whether insanity be general or partial the defendant must have been mentally diseased to such a degree that his reason was dethroned at the time of the commission of the act complained of. When reason ceases to have dominion over the mind, proved to be diseased, a person reaches a degree of insanity where criminal responsibilty, for the purpose of punishment, no longer exists. The question of insanity has exclusive reference to the act with which the defendants are charged, at the time of its commission, and it is their mental capacity at that time which the jury must determine. After all is said, the test of legal insanity is this: Did the defendants at the time of the killing, if you believe from the evidence beyond a reasonable doubt that they did aid and assist in the killing of John Sweeney, know what they were doing

and that they were doing wrong? If they did know what they were doing and that it was wrong, they were legally sane and amenable to the law. If they did not know that what they were doing was wrong, they were legally insane [fol. 153] and they should be excused for committing the act. In determining whether or not they were legally insane, you should accept the definition of legal insanity which the Court has just given you.

If you are satisfied beyond a reasonable doubt that the defendants aided, assisted and encouraged the killing of John Sweeney in the manner and form alleged in the indictment, or within the lesser degree included therein, then you are to consider the mental capacity of the defendants at the time the homicide is alleged to have been committed.

There is a legal presumption that a person intends the ordinary consequences of his voluntary act. This is a disputable presumption, and may be controverted or overcome by evidence, and so far as the capacity to form a criminal intent is concerned, it is sufficient to hold the defendants responsible in this case, when they did the act charged, if you find that they did the act charged, and had sufficient reason and understanding to know the nature, quality and consequences of the act they were doing and to distinguish between right and wrong in relation to that act as I have heretofore defined it to you.

A witness called to testify as a medical expert gave his opinions based upon hypothetical questions propounded to him. Before the opinions of such witness have any value whatever in determining the sanity or insanity of the defendants or their want of mental capacity you must first find that the hypothetical facts upon which such opinions are based are true as applied to the defendants, and if you find them to be true, then you must consider such opinions in connection with all the other testimony in the case and give to such opinions such weight and credit as you believe they are entitled to receive.

[fol. 154] If, after an entire consideration of the evidence in this case, you are satisfied beyond a reasonable doubt that at the time of the commission of the act charged in the indictment, if it was so committed, as therein alleged, the defendants were laboring under a defect or disease of the mind which dethroned their reason, rendered them in-

capable of understanding or appreciating the extent, nature, quality and consequence of the act they were committing, or that by reason of mental disease they were unable to distinguish between right and wrong in relation to such act, they should be acquitted on the ground of insanity, and if you should find them not guilty on the ground of insanity, you must state that fact in your verdict.

If you believe from the evidence in this case, that the defendants at the time of the commission of the crime charged in the indictment, if any such crime was committed, were in a state of voluntary intoxication, this fact, of itself, does not render the act less criminal and in this sense, I charge you, is not available as a defense; but upon the question whether the act was done with deliberation and premeditation, as charged in the indictment, it is proper to be considered by you in connection with all other facts appearing on the trial in determining the degree of guilt.

Where two or more crimes form part of the same transaction, in a case wherein the defendant is charged with the commission of one of such crimes, evidence of the other crime or crimes than the one charged may be heard. In this case, in accordance with that rule of law, evidence tending to disclose the commission of other crimes than the one charged has been given; but the defendants on trial are being tried only for the alleged murder of John Sweeney, and if you are not convinced beyond a reasonable doubt that [fol. 155] the defendants are guilty of that particular crime, in one or the other of the two degrees thereof, as I have explained them to you, your verdict should be not guilty, even though you may believe them to be guilty of other crime, or of other crimes. In this state, a defendant in a criminal case may be tried only for the crime charged in the indictment or for a lesser degree of the crime charged in the indictment, and the defendants are not upon trial for any other or different crime than the one charged or included in the indictment which will attend you in the jury room, namely; murder of John Sweeney, either in the first or second degree.

In the beginning of these instructions, I said to you that the jury are the exclusive judges of the effect and value of the evidence. This power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence.

You are not bound to find in conformity to the declarations of any number of witnesses, which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds.

A witness false in one part of his testimony is to be distrusted in others. It does not necessarily follow that a witness is a false witness merely because such witness has been contradicted, for the contradicting witness may be the false witness or may be an innocently mistaken witness; and the credibility to be accorded to the witnesses is a matter exclusively within the province of the jury. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which such witness testifies, by the character of his or her testimony, or by evidence affecting his or her character or motives, or by contradictory evidence.

[fol. 156] Evidence that a witness has been convicted of a crime is properly to be considered in determining the credibility to be accorded such witness.

Evidence of oral admissions of a party is to be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict; and therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

The principles of law which I have stated as applicable to the defendants on trial are all applicable to each defendant, respectively. Each defendant must be proven guilty in order to warrant the conviction of such defendant. One defendant may have been proven to have been legally insane at the time of the commission of the alleged offense, while you may find from the evidence that the other defendant was sane, or you may have a reasonable doubt as to whether such other defendant was sane or insane, in which case, the defendant whom you find to be legally insane should be acquitted on the ground of insanity no matter what verdict you may render as to the other defendant.

If you have a reasonable doubt as to the guilt of one of the defendants on trial, your verdict should be not guilty

as to such defendant, no matter what verdict you may render as to the other defendant.

In other words, while the defendants Ellsworth Kelley and James Willos, are being tried together in this case, each defendant is entitled to have the evidence in said cause considered in respect to him only as such evidence applies to [fol. 157] such defendant. The evidence in the cause is to be c-nsidered in the light of the instructions given to the jury and said evidence is to be considered in favor of, or against each of said defendants separately, the same as though each of said defendants was being tried separately fr-m the other defendant.

In determining the guilt or innocence of defendants, you should not be influenced by sympathy nor swayed by passion or prejudice.

It will require the unanimous agreement of all the members of the jury in order to warrant the return of a verdict; and when you have unanimously agreed to a verdict, your foreman should sign it and it will be taken as the verdict of this jury.

Forms of verdicts will accompany you in conformity with these instructions.

[fol. 157a] In Circuit of Marion County

[Title omitted]

Motion in Arrest of Judgment—Filed in Supreme Court December 31, 1925

Comes now the defendants by their attorney Will R. King and moves the court for an arrest of judgment wherein the said defendant Ellsworth Kelly and James Willos respectively are sentenced to be hanged until dead on January 8th 1926 and that the said judgment now and forever be arrested and held null and void, for the reason that the court had no jurisdiction — the person of the defendants or the trial thereof or *trial thereof or* e-thier thereof.

I

In that neither of the defendants named were at anytime during the trial of the above cause within the jurisdiction of the above court as appears from affidavit hereto before filed herein.

II

That it appears from unquestioned evidence that James Willos was in the custody and in charge of the San Quentin State Penitentiary of the State of California.

III

That defendant Ellsworth Kelly had been sentenced to serve twenty years in the Oregon State Penitentiary the term of which had not expired.

IV

And the escape of each of the defendants was due to a violation of that section of the Constitution of the United States and Constitution of the State of Oregon wherein it is provided that cruel and unusual punishments shall not be inflicted.

Will R. King, Atty. for Defendant James Willos and Ellsworth Kelly.

[File endorsement omitted.]

[fols. 157b-157f] State of Oregon,
County of Coos, ss:

I, Will R. King hereby certify that I did on the 24th day of December 1925 place in the U. S. Mails at Salem, Oregon a copy of the within motion and affidavit with postage prepaid thereon in advance together in an envelope addressed to John H. Carson district Attorney Salem, Oregon and that I believe that in due course of the mail he did receive same.

Will R. King, Atty. for Defendant, Portland, Oregon.

[fol. 158] IN SUPREME COURT OF OREGON

In Bank

STATE OF OREGON, Respondent,

v.

ELLSWORTH KELLEY and JAMES WILLOS, Appellants

Appeal from Marion County

Hon. Percy R. Kelley, Judge

Argued and Submitted June 3, 1926

OPINION—Filed June 22, 1926

Will R. King and Martin L. Pipes for appellants.
John H. Carson, District Attorney, and Allan G. Carson (Lyle J. Page on brief) for respondent.
BURNETT, J.: Affirmed.

[File endorsement omitted.]

[fol. 159] BURNETT, J.:

The defendants Kelley and Willos, together with one Tom Murray, were jointly indicted by the Grand Jury of Marion County in an indictment the charging part of which is as follows:

"The said Tom Murray, Ellsworth Kelley and James Willos on the twelfth day of August, A. D. 1925, in the County of Marion and State of Oregon then and there being, did then and there unlawfully, feloniously, purposely and of deliberate and premeditated malice kill one John Sweeney by shooting him, the said John Sweeney, with a pistol, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon"

Having been convicted of murder in the first degree without recommendation by the jury, they were sentenced to death and have appealed.

In the bill of exceptions presented by them, there is no objection to the charge of the court to the jury at the trial. We are urged to consider some criticisms made by industrious counsel against some features of the charge. In State v. Cody, 18 Or. 506, it was held that the defendant could raise exceptions to the charge in this court for the first time without having made any objections at the trial, but in State v. Foot You, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537, this doctrine was distinctly repudiated and State v. Cody was expressly overruled on that point. The overruling of State v. Cody was followed also in State v. Daley, 54 Or. 514, 103 Pac. 502, 104 Pac. 1, and State v. Brinkley, 55 Or. 134, 104 Pac. 893, 105 Pac. 708. A leading case is Kearney v. Snodgrass, 12 Or. 311, which holds that:

"* * * it is not error simply, but error legally excepted to that constitutes ground for reversal."

That case is firmly implanted in our jurisprudence as a guiding principle and has never been disturbed from that date to this. We must, therefore, decline to consider exceptions not embodied in the bill.

Of the twenty-eight assignments of error mentioned in the brief of the defendants, Numbers One, Two, Four, Five and Eleven are not in the bill of exceptions. It is assigned also as error in Number Three that the court was wrong in [fol. 160] allowing Dr. Prime to testify about wounds on the body of James Milton Holman, and in Numbers Eight and Nine, the defendants complain about allowing the witness Dalyrmple to testify about a note book of one Bert (Oregon) Jones, but there is not enough in the bill of exceptions in the way of recitation of testimony to explain these assignments.

In assignments Numbers Six and Seven the defendants complain about admitting in evidence the commitment of themselves and the above named Jones to the penitentiary. These documents were admissible to explain the situation and show that all of them were convicts and to be considered with other evidence tending to show that they were in the act of escaping from confinement when the homicide was committed.

In assignments Numbers Ten and Twelve, the defendants claim that the court was wrong in admitting the testimony

of a stenographer about statements of the defendants made to the district attorney without first having shown that defendants were not coerced, but made the declarations voluntarily. A careful reading of the subject matter involved discloses no confession of guilt on the part of the defendants. On the contrary, they denied any participation in the killing of Sweeney or any attempt to kill him. The defendants contend that it must appear that confessions were made voluntarily and without any fear or compulsion exercised upon the defendants making them. Granting for the moment that the statements reported by the stenographer were indeed confessions or distinct admissions of guilt, the admissibility of any inculpatory statement of defendants is a question of law in the first instance for the court and, in the absence of any showing on that subject in the bill, we must presume that the court did its duty and required such a showing to be made. There is no challenge in the bill to the sufficiency of any showing. Section 1781, Oregon Laws, referred to by the defendants in their brief, refers to a judicial examination of a charge before a magistrate and, in that instance, it is made the duty of the magistrate to inform the defendant that it is his right to make a statement in relation to the charge against him. This section, however, does not refer to any case such as that disclosed in the evidence where the defendants are said to have had [fol. 161] conversation with the district attorney concerning their presence and actions at the time Sweeney was killed. We have carefully considered the citations of counsel respecting the necessity of confessions being voluntary, particularly the case of Bram v. U. S., 168 U. S. 532. That precedent was discussed in State v. Morris, 83 Or. 429, 163 Pac. 567, and was not deemed controlling although the case for coercion of the defendant was stronger than in this instance. A kindred question is raised in the Assignment of Error Number Thirteen, where the defendant Willos was called as a witness without having been informed that it was unnecessary for him to give testimony regarding himself, but in this instance, as disclosed by the bill, he was called by his own counsel as a witness in his own behalf. Under such circumstances there is no requirement of law that the court or the prosecution shall interpose and warn him about his legal rights.

It is said a mistake was made by the court in admitting a knife in evidence. The testimony recited in the bill discloses that the co-defendant Murray was armed with a knife at the time the defendants escaped from the penitentiary and that this knife was found in the vicinity where the defendants went into hiding immediately after their escape. There was no error in admitting it in evidence.

As a fifteenth objection, error is assigned with reference to shots having been fired into the "bull pen", a designation of a certain place of confinement at the penitentiary. The bill discloses that the defendant Murray was called as a witness on behalf of the defendants and on direct examination was asked if it was a current report among the prisoners that shots were fired into the "bull pen" by the guards and he answered "Yes". On motion of the district attorney, the answer was stricken out. There was no error in this for it was not pretended that it was part of the res gestæ or that it was any more than a current report among the convicts.

In the seventeenth and eighteenth assignments the defendants object to cross-examination of themselves while they were on the witness stand. Kelley was asked if he got into trouble in Iowa and a like question was asked of [fol. 162] Willos about his alleged conviction of crime in Oklahoma. Whether or not this was relevant cross-examination we are unable to discern in the absence of a report of what the direct examination was.

In Raffel v. The United States of America, decided by the Supreme Court of the United States June 1, 1926, it is said:

"The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. Reagan v. United States, 157 U. S. 301; Fitzpatrick v. United States, 178 U. S. 304; Powers v. United States, 223 U. S. 303; Caminetti v. United States, 242 U. S. 470; Gordon v. United States, 254 Fed. 53; Austin v. United States, 4 F. (2d) 774. When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules, he may be cross-examined as to the facts in issue. Reagan v. United States, supra, 305; Fitzpatrick v. United States, supra; Tucker v. United States, 5 F. (2d) 818. He may be examined for the purpose of impeaching his credibility. Reagan v. United States, supra, 305; Fitz-

patrick v. United States, supra, 316. His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed. Caminetti v. United States, supra. His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarassing."

We do not know from the bill to what extent the defendants, while testifying in their own behalf, went in recounting the history of their lives and, like any other witnesses, they are subject to cross-examination on those questions.

In the nineteenth assignment, it is indicated that Johnson Smith, who was said to be a former warden of the State Penitentiary, was called as a witness for the defendants. His examination as quoted in the bill of exceptions reads:

"Q. Was Mr. Kelley, the defendant here, during your incumbency, confined in the bull pen?

A. I believe he was.

Q. Did you have occasion to notice any effect that this confinement may have had upon his mentality, before and after?

A. Upon Kelley?

Q. Yes.

A. No, I think he was in the bull pen only a few days when I was there, a very short period.

Q. Was that long enough in order for you to determine whether there was any change in him?

A. No, not in Kelley's case."

[fol. 163] Counsel for defense then made an offer in writing as to the purpose of his question propounded to the witness, as follows:

"The purpose of the interrogatory of Mr. Johnson Smith, formerly warden of Oregon State Penitentiary, is to show that he, by experience and observation, had an opportunity to observe the change and effect of confinement in the bull pen in the Oregon State Prison, had upon the mentality of inmates confined in what is known as the bull pen and dungeon of said prison, that any confinement in excess of a few days was noticeable upon the mind and actions of those so confined, and to state actions disclosing an unfavorable

change in the mental action and action of the mind to a material extent upon the individuals so confined especially when for periods of more than a week to ten days."

The witness had disclaimed any knowledge respecting the defendant Kelley on the subject involved in the examination. The offer to prove was not responsive to any interrogatory propounded to the witness. Moreover, that tender of testimony was not confined to either of the defendants on trial but took entirely too wide a range and is not shown by the bill to have been applicable to any state of facts in issue.

As stated, the defendants are both convicts imprisoned in the Oregon State Penitentiary and it seems from the testimony that they had escaped from prison in other jurisdictions. The defendants claim that the sentence of death imposed upon them by the judgment of the court is forbidden by section 1576, Oregon Laws, reading thus:

"If the defendant is convicted of two or more crimes, before judgment on either, the judgment must be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of such crimes; and if the defendant be in imprisonment upon a previous judgment on a conviction for a crime, the judgment must be that the imprisonment must commence at the expiration of the term limited by such previous judgment."

Their theory seems to be that owing to the fact that each of them being then under sentence to imprisonment for other offenses, the trial court had no jurisdiction to punish them for a crime committed while the pending imprisonment was in force. It will be noted that the section just quoted refers only to imprisonment and not to the penalty of death or [fol. 164] fine. The section does not purport to exempt a defendant from trial and judgment for the commission of any crime during his confinement in the penitentiary. It would be shocking to all sense of justice and public security to say that a criminal confined in the penitentiary as punishment for his misdeeds could be licensed to commit other crimes with immunity; yet, that is the conclusion to which the argument of the defendants' counsel will lead. If the jury had found such a verdict as would authorize their im-

prisonment, the section quoted would be the authority for the court to declare that the latest imprisonment should begin at the expiration of the term then being served by the defendants. The punishment of death is an entirely distinctive thing and is not included in the provisions of this section.

According to the statements of the defendants as reported in the bill of exceptions, their confinement in the penitentiary became irksome to them. They complained of being incarcerated in solitary confinement and being fed but one meal a day, and the like. They contend that this had a tendency to impair their health and to render them apprehensive of death or great bodily harm. They argue that they were entitled to act as they did in self-defense. They asked the court to give the following instruction:

"I further instruct you, that under the State and Federal Constitution, cruel and unusual punishment shall not be inflicted, and that if you find under the evidence in this trial, that the same was inflicted upon the person of this defendant within a reasonable time prior to, and immediately before the alleged prison break, and that defendant was living in enforced fear and belief of unlimited repetition thereof, and that his escape was the only means of avoiding the same, you should find the defendant 'not guilty'."

A similar instruction is found in Assignment Number Twenty-five. The defendants are not judges of the question of punishment. That is committed to the courts under the provisions of the statutes. Even if they had the right to escape that would not include the right to kill to effect their purpose. There is nothing to show that there was any imminent danger of death or great bodily harm to either of them in any situation arising without their fault. It is said in 30 C. J., page 45:

[fol. 165] "It is well established that one who is the aggressor or provokes the difficulty in which he kills his assailant cannot invoke the right of self-defense to justify or excuse the homicide, unless he in good faith withdraws from the combat in such a manner as to show his adversary his intention in good faith to desist. It is not enough to justify or excuse the homicide that in the course of the difficulty it became necessary for defendant to kill the deceased in

order to save his own life or prevent great bodily harm; but he must also have been free from fault in provoking or continuing the difficulty which resulted in the killing. Accused cannot avail himself of, or shield himself on the ground of, a necessity which he has brought on by his own fault or wrongful act."

As to the imminence of danger, on page 57 of the same volume appears this language:

"In order to justify or excuse the taking of human life in self-defense the danger or peril of loss of life or the infliction of serious bodily harm must be, or appear to be, impending and imminent; the danger must be either actual, present, and urgent, or such as the slayer believes on reasonable grounds to be so urgent and pressing that it is necessary for him to kill in order to save himself from immediate death or great bodily harm. A mere fear or belief on the part of accused that he will suffer great bodily harm or loss of life in the future, as distinguished from the present, does not constitute a justification or excuse. Nor is a past danger sufficient."

The only imminent danger of death or great bodily harm to which the defendants were subjected at any time, as disclosed by the record, occurred during their escape from the prison when the guards were shooting at them to prevent their escape. This was a situation brought about by their own wrong doing and furnishes no ground for any instruction on self-defense. Mere irksomeness or rigor of imprisonment will not justify convicts in killing their keepers. Self-defense cannot lawfully be predicated on such premises.

The defendants complain that the court was wrong in not giving a charge to the effect that the defendants were on trial charged with having killed John Sweeney and no one else. The bill of exceptions does not disclose but what this or a similar instruction was given. They also say that the court erred in not giving an instruction about viewing certain admissions and statements made by the defendants with caution.

[fol. 166] It is said in section 868, Oregon Laws:

"The jury, subject to the control of the court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions, * * *

"4. That the testimony of an accomplice ought to be viewed with distrust, and the oral admissions of a party with caution; * * *"

In the absence of any showing to the contrary, we must presume that the court obeyed the law of this section.

In the twenty-seventh assignment the defendants complain about the court not giving the following direction to the jury:

"The right to qualify a verdict of murder in the first degree or guilty of murder in the first degree by adding the words 'we recommend life imprisonment' is thus conferred upon the jury in all cases of murder in the first degree. The law does not itself prescribe any rule defining or circumscribing the exercise of the right, but commits the whole matter of its exercise to the judgment and conscience of the jury. This being the law, you are not limited in your deliberations to the testimony adduced at the trial; nor is it dependent upon mitigating or palliating circumstances, you are accorded the privilege, under the law of making such recommendation for whatever reason your conscience may dictate; and if after taking into consideration the entire evidence, whether such evidence shall be sufficient in your judgment to establish the insanity defense relied upon beyond a reasonable doubt or not, you are at liberty to take into consideration any or all evidence, if any, adduced for that purpose in determining whether in the exercise of your discretion or conscience with reference to such recommendation, you may return a verdict with recommendation for life sentence as I have stated, or disregard the same and return such verdict whether for or without a recommendation of life imprisonment. And in this connection, I instruct you, that as to how far considerations of age, sex, illness, if any, or mental impairment, if any, or intoxication, of whatever nature or kind, if any, or mental impairment,

of any, or human passion, or weakness or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, all of which committed by the constitution of this state and legislative enactment based thereon to your sound discretion and to your sound discretion alone."

Section 131, Oregon Laws, prescribes the oath of a jury as follows:

[fol. 167] "As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give according to the law and evidence as given them on the trial."

The request to instruct just quoted is faulty in that it invites the jury into the realm of speculation and imagination entirely outside the pale of the law and evidence. It is an invitation to violate their oaths to try the case according to the law and evidence and was properly rejected.

Finally, it is assigned as error that the indictment does not state facts sufficient to constitute a crime in this:

"* * * That John Sweeney died within a year and a day from the time the fatal shot was fired."

As stated in the indictment, the defendants are thus charged:

"The said Tom Murray, Ellsworth Kelley and James Willos on the twelfth day of August, A. D. 1925, in the County of Marion and State of Oregon then and there being, did then and there unlawfully, feloniously, purposely and of deliberate and premeditated malice kill one John Sweeney by shooting him, * * *".

If the defendants killed Sweeney on the day mentioned he must have died at that time. No man can be said to be killed unless he is dead. Moreover, the indictment substantially follows the form prescribed in the appendix to

the criminal code. This has been uniformly held to be sufficient as to allegation. State v. Weston, 102 Or. 102, 201 Pac. 1083.

There is no error discernible in the record before us. The judgment of the circuit court is affirmed.

[fol. 168] In Supreme Court of Oregon

[Title omitted]

Judgment—June 22, 1926

This cause on June 3, 1926, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record, and then reserved for further consideration, and the court having fully considered all said questions, as well as suggestions of counsel in their argument and briefs, find there is not error as alleged.

It is therefore considered, ordered and adjudged, that the judgment of the court below in this cause rendered and entered be and the same is in all things affirmed.

It is further ordered, that this cause be remanded to the court below from which the appeal was taken, with directions to enter a judgment in accordance herewith.

[fol. 168a] [File endorsement omitted.]

Exhibit B.

In Supreme Court of Oregon, March Term, 1926

[Title omitted]

Petition for Rehearing—Filed August 6, 1926

Assignments of Error

Come now the appellants, Ellsworth Kelley and James Willos, and repectfully move the Court for a rehearing in the above entitled cause.

As grounds for the motion the appellants allege that the Court erred in the following particulars:

1. In holding that the Court would not notice or decide whether or not the Court below erred in its instructions defining robbery. The particular instructions are the three set out in full in the brief filed herewith in support of this motion.

[fol. 168b] 2. In holding that because the said instructions were not excepted to by the appellants the Court would decline to notice them.

3. In holding that the rulings of this Court requiring exceptions to instructions, or other errors, were applicable to the instructions here complained of.

4. In not holding that no exception was required to give this Court jurisdiction to hear and determine the question of error assigned, because the error was one that could not be waived by the appellants.

5. In not holding that each of the said instructions was reversible error, and in not reversing the judgment by reason thereof.

6. In admitting in evidence the stenographic report of the questions and answers of Ellsworth Kelley and James Willos, taken at the penitentiary, over the objection of the appellants' counsel that there was no evidence that the said statements were voluntary.

7. In holding that the said statements were voluntarily made, not appearing in the bill of exceptions.

8. In holding that it would be presumed that there was other evidence that the statements were voluntarily made, not appearing in the bill of exceptions.

9. In holding that it was the duty of the appellants, if [fol. 168c] there was other such evidence, to have it incorporated in the bill of exceptions, instead of holding that it was the duty of the District Attorney, if there was any such evidence, to see that it was incorporated in the bill of exceptions.

10. In holding that the said statements did not constitute confessions, but only admissions, and in holding that

the exculpatory matter in the said statements reduced them from confessions to admissions.

11. In not holding that the facts stated by each of the appellants in their said statements were acts involving and implying the guilt of the appellants of some degree of the crime charged and of an element of such crime.

12. In holding that the admission by both of the appellants that they planned together with Jones and Murray to escape from the penitentiary was not a confession of an element of the offense charged.

13. In holding that the failure of the District Attorney, when the evidence of each appellant was taken at the penitentiary, to inform the appellants of their right to counsel and of their right not to make any statements, and that if one was made by them it could be used against them on the trial, did not make the statements so procured incompetent and inadmissible as evidence against them on the trial.

[fol. 168d] 14. In not holding that the proceeding taken at the penitentiary was extra-judicial and extra-legal and void for every purpose, and the evidence so procured incompetent to be used against the appellants, or either of them.

17. In sustaining the trial court's refusal to give the instruction requested in appellants' assignment number 26 (Bill Ex. p. 53; quoted on p. 22 of brief on appeal).

18. In sustaining the trial court's refusal to give the instructions requested in our assignment number 24 on appeal (Bill Ex. p. 415) Tr. p. 86 to the effect that if found that cruel and unusual punishment was being inflicted upon them within a reasonable time prior to the prison escape in which Sweeny was killed, and defendants were living in enforced belief of continuous repetition thereof, and that escape was the only means of avoiding believed great [fol. 168e] bodily harm, the jury could take same into consideration in arriving at their verdict, or verdicts, etc.

19. In holding that the only testimony bearing upon question involved in the last error above assigned (number 18) was limited to that stricken out, given by Tom Murray, mentioned on page 977 of opinion, as our fifteen assign-

ment of error; and in not considering in connection therewith the testimony given at the trial of both Kelley and Willos, defendants, as disclosed by reference thereto on page 52 of Bill of Exceptions, and as set out on pages 55 to 77 inclusive, in Bill of Exceptions.

20. In application of the usual rules and law applicable to the plea of self defense, where the controversy, or combat, is immediately between individuals to the facts disclosed by the testimony given by defendants, Kelley and Willos, respectively, in which there was presented to the jury for consideration a long series of events disclosing cruel and unusual treatment by which defendants were placed in constant fear of great bodily harm and ultimate death, and in not holding there was error in the court's refusal to instruct the jury relative to the law applicable to the conditions thus presented by the evidence.

21. In not distinguishing between conditions affecting accused where the treatment cruelly invoked upon the person of defendants incarcerated within prison walls under the with the law and usual enforced restrictions, where the com-[fol. 168f] pliance with the law and usual requirement of first retreating to the wall, etc., usually invoked in ordinary and usual homicides, before the killing was, by the confinement within prison walls, made impossible.

22. In holding and recognizing that the defendants were within the jurisdiction of the trial court when tried; and in not holding that under the evidence adduced, as disclosed by the record, defendants, when tried, were within the exclusive jurisdiction of the Warden of the Oregon Penitentiary.

23. In holding that the execution of the sentence imposed could be made effective, prior to the expiration of the terms of imprisonment for which confined as disclosed by the record.

EXHIBIT "A"

[fol. 168g] IN SUPREME COURT OF OREGON

APPELLANTS' BRIEF

* * * * * * *

(16) Error is also predicated upon the Statutes authorizing executions under which defendants, James Willos and Ellsworth Kelley, respectively, have been sentenced as being void, not having been enacted in conformity with either the Bill of Rights of the Constitution of the United States or of Article One of the State of Oregon.

* * * * * * *

[fol. 168h] (20) The court erred in entering judgment fixing date of execution prior to expiration of sentence of James Willos in San Quentin State Prison, California, and prior to subsequent sentences including the sentence of Ellsworth Kelley, respectively, in the Oregon Penitentiary, respectively. (Oregon Code. Sec. 1576); and for the further reason that defendants were not within the jurisdiction of the warden of the Oregon State Penitentiary only.

In this connection attention is called to the affidavits of [fol. 168i] the respective defendants in this record to the effect that throughout the trial that each were under the charge and in control of the Deputy Warden of the Oregon State Penitentiary, and not under the charge of the Sheriff.

(21) The court erred in entering judgment that the defendants be hanged prior to the expiration of the sentences for which they were serving in the Oregon State Penitentiary, in that under Sec. 1576 Olson's Oregon Code—under the evidence offered in which to serve and the sentence imposed upon them and each thereof, to the effect that they, and each thereof must serve a certain time in the Oregon State Penitentiary and then on date fixed be hanged by the neck until dead.

The above statute provides in effect that when one is confined in a state prison conviction for a crime subsequent to his incarceration therein the sentences following that may be imposed, when convicted of a crime, shall begin at the ex-

piration of his former sentence, and it is here accordingly alleged that no sentence can be imposed without violating the 14th Amendment of the Constitution of the United States to the effect that no one shall be deprived of his life and liberty without due process of law, which rule of law has been in effect r since the days of the Magna Charta and the Subsequent Bill of Rights of 1689, including the [fol. 168j] Bill of Rights incorporated in the fundamental laws of our land, including those of Oregon.

Magna Charta (1215 A. D. S. 4p
Bill of rights (1628 A. D.) Par. 5, 9.

Blackstone (Book 4, Star page 186) says:

"There is one species of homicide (se defendo) where the party slain is equally innocent as he who occasions his death; and yet this homicide is also excusable from the great universal principle of self preservation, which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish."

* * * * * * *

[fol. 168k] (23) The court erred in not giving the instruction requested in exception No. 19 (Bill of Exceptions, p. 24) as follows:

I instruct you, that the right of self defense is never waived, and that it is within your province if you find under the circumstances in this case that the state has not sustained its allegations beyond a reasonable doubt, you may find the defendant not guilty.

(24) The court erred in not giving instruction No. 23, [fol. 168l] as requested by counsel for appellants, James Willos and Ellsworth Kelley, as follows:

"I instruct you, ladies and gentlemen of the jury, that defendants are on trial charged with having killed John Sweney and no one else. Whether any other person was killed or injured on the occasion may be taken into consideration including how he may have been killed, or by whom, may only be considered by you as one of the incidents or circumstances connected with the killing, if anyone was killed, in determining who killed John Sweney, and who, if anyone, may have aided or abetted therein."

(25) The court erred in not giving instruction No. 24, (referred to in Bill of Ex. p. 45, 46) Tr. 86, as requested by counsel for appellants, James Willos and Ellsworth Kelley, as follows:

"I further instruct you that under the law of the land, under the fundamental laws, National and State, under which we are governed, it is provided that cruel and unusual punishments, shall not be inflicted and if you find under the evidence adduced that cruel and unusual punishments had been inflicted upon defendants, or either of them, and that under methods and procedure in general use in the Oregon State Penitentiary defendants or either of [fol. 168m] them had cause to fear repetitions thereof, at great risk of bodily harm, which includes enforced ill health to body or mind by reason of methods alleged to have been used, or that may have been used with respect to defendants within a reasonable time prior to the alleged break of defendants from said prison, and that defendants were living in enforced fear and belief of unlimited repetition thereof, and that escape was the only practicable means of avoiding such believed great bodily harm, if it was believed, then you may take such consideration in arriving at a verdict, or verdicts, in this case."

* * * * * * *

[fol. 168n] (27) The court erred in not giving instruction referred to in Exception No. 26, (Bill of Ex. p. 46) Tr. 87 which read as follows:

"The right to qualify a verdict of murder in the first degree or guilty of murder in the first degree by adding the words "we recommend life imprisonment" is thus conferred upon the the jury in all cases of murder in the first degree. The law does not itself prescribe any rule defining or circumscribing the exercise of the right, but commits the whole matter of its exercise to the judgment and conscience of the jury. This being the law, you are not limited in your deliberations to the testimony adduced at the trial; nor is it dependent upon mitigating or palliating circumstances, you are accorded the privilege, under the law, of making such recommendation for whatever reason your conscience may dictate; and if after taking into consideration the entire evidence, whether such evidence shall

be sufficient in your judgment to establish the insanity defense relied upon beyond a reasonable doubt or not, you are at liberty to take into consideration any or all evidence, if any, adduced for that purpose in determining whether in the exercise of your discretion or conscience with reference [fol. 168o] to such recommendation, you may return a verdict with recommendation for life sentence as I have stated, or disregard the same and return such verdict whether for or without a recommendation of life imprisonment. And in this connection, I instruct you, that as to how far considerations of age, sex, illness, if any, or mental impairment, if any, or intoxication, of whatever nature or kind, if any, or mental impairment, if any, or human passion, or weakness or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, all of which committed by the constitution of this state and legislative enactment based thereon to your sound discretion and to your sound discretion alone." Winston v. U. S. 172, U. S. 302.

[fol. 169] IN SUPREME COURT OF OREGON

[Title omitted]

ORDER DENNYING PETITION FOR REHEARING—September 14, 1926

Now at this time the court being fully advised in the premises, it is ordered that the petition for a rehearing heretofore filed herein be and the same is hereby denied.

[fol. 170] IN SUPREME COURT OF OREGON

[Title omitted]

SECOND PETITION FOR REHEARING—*Filed September 15, 1926*

Come now the defendants and petition for a rehearing in the above entitled cause, on the following grounds:

1. That the six judges who passed upon the former petition for rehearing had no legal authority to decide the questions therein raised, one of the judges, Judge Rand, who heard the case not having participated in the decision on the said petition for rehearing, and not being present on the bench in court when the said petition was denied.

2. That neither in the original opinion handed down, nor in the order denying the petition for rehearing, did the Court state, consider or decide that the instructions given by the lower court, referred to in the first petition for rehearing, were or were not erroneous.

3. That neither in the original opinion nor in the order denying the petition for rehearing has the Court stated or decided the question raised in the original hearing, and in the petition for rehearing, that the objections against the said instructions urged were of a class that required an exception in the lower court.

4. In the order denying the petition for a rehearing it has not been decided that the lower court had jurisdiction of the person of the defendants during the trial, it appearing from the record that the defendants at the time of the trial were in the legal custody of the executive department of the State, and it does not appear from the record that the Court, by any process, obtained the custody of the defendants for the trial; the point on this being that the defendants could not be legally tried in the court when not in the custody of the court and subject to its orders, and where the defendants, being in the custody of the executive department, could not make a voluntary appearance so as to give the lower court jurisdiction.

[fol. 171] And the defendants in this petition renew all of the points made in the original hearing and in the first petition for rehearing.

And the defendants respectfully pray that the mandate herein shall be withheld, and if it has been sent down before this petition is filed, that it shall be recalled until this petition shall be decided by the full court.

And the defendants respectfully pray that they may have such reasonable time as the Court may fix for the presentation of an argument and authorities upon the points here made.

Respectfully submitted.

Will R. King, Martin L. Pipes, Attorney for Defendants.

[File endorsement omitted.]

[fols. 172-182] In Supreme Court of Oregon

[Title omitted]

In bank

Appeal from Marion County

Order Denying Second Petition for Rehearing—September 21, 1926

Now at this time the court being fully advised in the premises, it is ordered that the second petition for a rehearing heretofore submitted be and the same is hereby denied.

[fol. 183] In Supreme Court of Oregon

[Title omitted]

Petition for Writ of Error—Filed November 1, 1926

Now comes Ellsworth Kelley, one of the Defendants and Appellants in the above entitled cause, and shows to this Honorable Court, that in the record, proceedings and rendi-

tion of the judgment in the above entitled cause by the Supreme Court of the State of Oregon, it being the highest Court of said state, in which a decision could be had, manifest error has occurred greatly to the damage of said Ellsworth Kelley whereby Petitioner feels aggrieved.

That in the record and proceedings, it appears there was drawn in question the construction of a clause of the Constitution of the United States, and of rights claimed by your Petitioner under the Fourteenth Amendment of the said Constitution; that the decision of the State Supreme Court was against the right, title and privileges especially set up and claimed under such clause of the said Constitution, all of which is fully apparent in the record and proceedings of the case, and specifically set forth in the Assignment of Errors filed herewith.

That these errors were duly urged and presented before the highest court of Oregon fully appear in briefs and arguments accompanying this Petition hereinafter referred to in Assignments of Error and made a part hereof. And the particular Federal questions raised were; that your Petitioner was compelled to furnish evidence against himself in violation of his rights as a citizen of the United States, and under the guarantees of the Fourteenth Amendment of the Constitution of the United States; and further the said Statute, Section 1903, under which your said Petitioner has been sentenced to death is void and contrary to the said provisions of the said Constitution;
[fol. 184] And further the said Statute, when the discretion was given to the jury to impose a punishment is also in direct conflict with the said Fourteenth Amendment to the Constitution of the United States.

And further your Petitioner was deprived of his rights under the said Fourteenth Amendment by the refusal to give certain instructions in connection with cruel and inhuman punishment which had been inflicted upon your said Petitioner immediately prior to the commission of the offense for which sentence of death was imposed in violation of Article VIII. of the Constitution of the United States and of the Fourteenth Amendment of the Constitution of the United States as will more specifically appear in Assignments of Error filed herewith under and by virtue

of which he had reasonable grounds to believe his life at all times in danger to save which the law of "Self preservation" made it essential to escape that he might not only avoid a continuation of cruel and unusual punishment, but impending eventual and unlawful death as will more fully appear in the assignments of error accompanying this petition.

Wherefore, Petitioner now prays that this Writ of Error be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made duly authenticated be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of said Court as in such cases made and provided in order that the same may be inspected and by the United States Supreme Court corrected as according to law and justice should be done.

Will R. King, Attorney for Petitioner.

[fol. 185] In Supreme Court of Oregon.

[Title omitted]

Assigments of Error—Filed November 1, 1926

Wherefore, A petition for Writ of Error from the Supreme Court of the State of Oregon to the Supreme Court of the United States has been presented this day for allowance under the rules of the court and the law in such cases, *an* Assignment on Error are necessary,

It is now assigned as error:

1. The Court of highest resort of the State of Oregon, erred; in holding that Section 1903 of the Oregon Code, as Compiled by Olson, is constitutional and not in violation of the fourteenth amendment to the constitution of the United States; and in not holding that said provision of the Oregon Code,. as enacted was illegal and void and in violation of the Bill of Rights of the Oregon Constitution and of the Bill of Rights of the Federal Constitution, as well.

2. That the Supreme Court of Oregon erred in depriving your Petitioner of his rights under the fifth, eig-th and fourteenth Amendments to the Constitution of the United States respectively, of the said Constitution by refusal to give certain instructions in connection with the law of self preservation and self defense in connection with cruel and unusual punishment admittedly inflicted upon said Petitioner leading to and in connection with the offense, or alleged crime, for which the death penalty herein complained of has been imposed which requested and refused instructions are hereinafter more particularly set forth.

In this connection it appears in the evidence adduced at the trial (Bill of Ex p. 55) it appears as follows:

That at various times he was confined in what is known as the "Bull Pen" on one small meal a day, because of having attempted to escape, limited to two blankets, sleeping accommodations (B. Ex. 56) steel slates two inches apart, not allowed to communicate with any one, buckets for filth cleaned every other day, all without knowning the [fol. 186] charges against him, with no opportunity of communication with counsel or any one in the outside world. (Bill Ex. p. 59) That while confined in the Bull Pen, a Mr. Hinton, a guard, "who was known to be a killer" or "at least a potential one, fired down (from the walls) into the Bull Pen cells while I was there." and "At the time of this firing the doors were locked. * * * There was absolutely no provocation whatever for the firing into these cells"

Q. During the time you were incarcerated there, in prison, did any knowledge come to you of any one having been injured or killed by being fired into?

A. Yes, sir.

Q. State what your information was regarding that, * * *?

A. Before I came there in 1923, in January, there was a man by the name of James Ogle (B. Ex. p. 60) had had different altercations with John Davidson who had the reputation of having killed several convicts during his life, all in just such helpless condition as he (Ogle) was at the time. * * * The information I received was that he was killed by Davidson as he was taking his exer-

cise, walking around the ring, known as "Bull ring" Davidson shot him from behind, killing him, then taking his body over the wall with a rope * * All this information came to me and I believed it; in fact it has never been questioned.

I also had other information that I was slated to be shot on the slightest provocation, along with James, Willos, Tom Murray and others. (B. Ex. 73) I was told by prisoners on several occasions that the guard who should kill me was to get fifty dollars reward, I decided to get away if I could. "I felt I was in danger if I remained and danger if I escaped."

(Bill Ex. p. 68.) I was in the bull pen 17 days without exercise, two in a cell, with no hear and had to walk to keep warm.

3. The court erred in declining to pass upon the question as to whether this defendant under the law under which tried could consent to his own execution by not objecting to an erroneous instruction which error resulted in so holding.

This pertains to the trial courts instructions that "If a Man knocks another down and takes from him property so in his presence and control, it is robbery." And in treating the Act to which such erroneous instructions was intended as the gist of the crime, rather than the alleged killing of Sweeney, as to which defendant, altho admittedly fired no shots was an alleged conspirator. In other words makes that murder in the first degree, which under the law is not a crime of that class, and because no objection made treats it (in effect) as a consent to his own execution.

4. The Supreme Court of Oregon erred in affirming the decision of the lower and trial courts in which it was held that that defendant,—Appellant (Plff. in error) was lawfully examined at the Oregon State Penitentiary by the District Attorney in the presence of other high officers without first having been advised of the nature of the proceedings and that he would not be required to give any information except upon voluntary statements, or voluntarily, and in admitting in evidence statements, thus elicited without the presence of counsel, and as stated without first hav-
[fol. 187] ing been advised by the District Attorney as to his statutory rights, or so advised by any one present, or at

all, which statements, taken while incarcerated in prison under sentence for another crime he made involuntarily against himself and which were subsequently and unlawfully admitted in evidence over the objection of his counsel, which statements were in part as follows?

"Q. When did you tell Jones and Murray you had cut the hole?

A. Well, they already knew, they knew we was going to cut it.

Q. How long had you been discussing the break?

A. Well, we had been discussing part of it—for a considerable time. We didn't figure on the shooting end of it.

Q. Well, except for the shooting, did you figure it just as you did it?

A. Except for the shooting. We figured we was going out the front gate, that was our intention, to go out the front gate."

It appears all through these statements of both appellants that all four men were engaged in an attempt to escape from the penitentiary where they were convicts. On page 24 (Bill Ex.) Kelley was asked:

Q. How long had you figured on making the break through the roof?

A. Well, we discussed it off and on several months but we hadn't decided on the exact method of doing it.

Q. Had you decided—how long prior to the time you got the hole made, on that particular day?

A. Yes, whenever—we had agreed to do it on commissary day, when the fellows were taking groceries up and back and forth."

5. This error is further assigned on the grounds that, as will appear from the transcript of the Bill of Exceptions that the Court Reporter took said statements in shorthand, transcribed the same, and, over the objections of counsel, was permitted to read the same before the jury; that this evidence was incriminating in its character and in volation of Article V. Amendment to the Constitution of the United States providing that: "No witness shall be compelled in any criminal case to be a witness against himself, or be deprived of life or liberty without [fol. 188] due process of law" and the further provision

in the Fourteenth Amendment to the Constitution of the United States to the same effect. That these statements were thus elicited under duress and admitted to be read in evidence is a clear violation of the provision of the said Fifth and Fourteenth Amendments to the Constitution of the United States. That Section 1576, Olson's Oregon Code, expressly provides:

6. That under the amendments and decisions of the Oregon Supreme Court it has been held that there is no common law crimes, or common law procedure, in Oregon with reference to crimes or criminal cases, from which it follows that the requirement to begin service of the sentence of twenty days and then to be executed without awaiting the expiration of previous sentences in prison is to and does deprive defendant, Ellsworth Kelley, of his life and liberty without the process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

7. Pursuant to the foregoing the assignments of error, and as a part thereof, the Supreme Court of Oregon further erred in failing to find that the following instructions should have been given by the Circuit and Trial Court of Marion County, State of Oregon in which defendant, Ellsworth Kelley, was tried, as follows:

"I further instruct you, that under the State and Federal Constitutions, cruel and unusual punishment shall not be inflicted, and that if you find under the evidence in this trial, that the same was inflicted upon the person of this defendant within a reasonable time prior to, and immediately before the alleged prison break, and that defendant was living in enforced fear and belief of unlimited repetition thereof, and that his escape was the only means of avoiding the same, you should find the defendant, "not guilty."

"Some evidence has been admitted showing certain statements and admissions made by defendants, but not under oath. I instruct you that while signed statements or admissions are admissible, and may be considered in your deliberations, they are to be viewed with caution, and in considering them you may take into consideration all the circumstances under which made, whether under fear, hope

of reward, or any other circumstances surrounding the same which may during the trial come to your attention."

"The right to qualify a verdict of murder in the first degree or guilty of murder in the first degree by adding the words," We recommend life imprisonment," is thus conferred upon the jury in all cases of murder in the first degree. The laws does not itself prescribe any rule defining or circumscribing the exercise of the right, but commits the whole matter of its exercise to the judgment and con- [fol. 189] science of the jury. This being the law, you are not limited in your deliberations to the testimony adduced at the trial, nor is it dependent upon mitigating or palliating circumstances, you are accorded the privilege, under the law, of making such recommendation for whatever reason your conscience may dictate; and if after taking into consideration the entire evidence, whether such evidence shall be sufficient in your judgment to establish the insanity defense relied upon beyond a reasonable doubt or not, you are at liberty to take into consideration any or all evidence, if any adduced for that purpose in determining whether in the exercise of your discretion or conscience with reference to such recommendation, you may return a verdict with recommendation for life sentence as I have stated, or disregard the same and return such verdict whether for or without a recommendation of life imprisonment. And in this connection, I instruct you, that as to how far considerations of age, sex, illness, if any, or mental impairment, if any, or intoxication, or whatever nature or kind, if any, or human passon, or weakness, or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist, which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, all of which is committed by the constitution of this state and legislative enactment based thereon, to your sound discretion, and to your sound discretion alone."

8. That the Supreme Court of Oregon erred in entering judgment that the defendant, Ellsworth Kelley be hanged prior to the expiration of the sentence for which he was serving in the Oregon State Penitentiary, in that under

Section 1576, Olson's Oregon Code, under the evidence offered in which to serve and the sentence imposed upon them and each thereof, to the effect that he must serve twenty days in the Oregon State Penitentiary, and then on a date fixed, long prior to the expiration of the term of imprisonment for which said Kelley was previously imprisoned and then serving sentence, be hanged by the neck until dead.

9. The Court erred in not holding that Ellsworth Kelley was within the jurisdiction of the warden of the Oregon State Penitentiary and not within the jurisdiction of the trial and Circuit in which purported to have been tried.

10. That all the questions involving the 5th, 8th and 14th amendments to the Constitution of the United States more fully appear from briefs Exhibits A. & B. respectively as used and urged in the Supreme Court of Oregon in this cause and made a part hereof.

[fol. 190] 11. The Court erred in not holding, from the record in this cause, that the lower court did not have jurisdiction of the person of the defendant at the arraignment, plea and trial of this defendant, for that the record discloses, without dispute, that the defendant was held in the custody of the Warden of the penitentiary of the State of Oregon, under the control and direction of the Governor and the executive department of said State, and that by reason of the commitment of the defendant to the warden to serve a period of twenty years, which term had not expired at the date of the said trial, nor for years thereafter the defendant could not voluntarily appear in the court below to be arraigned, to plead, to be tried or convicted; and for that the record does not show that the court below, by any order or process directed to the said Warden so in charge of the said defendant as a prisoner, as aforesaid, had obtained jurisdiction or custody of the person of the defendant for arraignment, plea or trial, and for the reason that the said Warden of the penitentiary had no legal authority, in the absence of such order or process of the said court below, to surrender the defendant to the court below, or to the Sheriff, its officer, or other officer, for trial in said court, and there is no presumption that the said Warden

exceeded his power or violated his duty in making such surrender without such order or process, but the presumption is that he performed his duty and did not surrender the defendant to the court below. And therefore the Court erred in affirming the judgment of the court below, and in not reversing the same for want of jurisdiction in the court below to try the defendant.

[fol. 191] On re-sentencing of defendant, Ellsworth Kelley (with James Willos) the following protest was orally made by Will R. King.

(The Court having fixed a time for the execution of the original sentence the date heretofore fixed having been passed while the case was on appeal to the Supreme Court) as counsel for defendants:

"If the Court please as counsel for defendants I would ask that they be permitted to be heard before sentence is pronounced.

The Court: There will be no sentence, sentence was pronounced some months ago, Judge. The only duty the Court has to perform is the one which the Court has performed. I will ask the district attorney to prepare the order.

Judge King: I will further request as counsel for defendants that I have permission to say something in their behalf.

The Court: I know of no purpose that could be served by a statement by defendants's counsel, but it is the duty of a court to hear any argument or contention that an attorney makes within the record, pursuant to that, Judge King, I will hear you.

Judge King: Then on behalf of defendants permit me to say, there are reasons why these defendants should not be sentenced. Some of them are: Under the statutes of Oregon no defendant—no one accused of a crime can be executed by his own consent. Another is that they may not be taken out of their cells and tried by district attorneys before trial and the evidence introduced at the trial, which has been done, which may have had undue effect upon the jury. Another is we have no common law crimes in Oregon, every crime prescribed must be made so by statute. There is no common law procedure in this state. These defendants as appeared from the record were serving sentences in the

state prison. Their sentences had not expired. There is no provision under the statute whereby they could be sentenced until their terms expired. Under every decision I can find it is held that you can not make a convict's sentence begin before the expiration of his former sentence unless the statute expressly provides, and our statute does not so provide, but we have one statute upon that subject and [fol. 192] is to the effect that when a defendant is sentenced to serve a sentence it shall begin at the expiration of the term of his former sentence.

Under the law of this state, the defendants' term begins, as your honor previously stated,—at the expiration of twenty days—he must be delivered to the warden of the state prison, but before doing so must serve a sentence of twenty days and then be executed, on the date fixed a few weeks later, but before the expiration of his then being served sentence. That constitutes a term of imprisonment under my view of the law. Then, if your Honor please, the statute makes no other provision for the serving of a sentence, hence no sentence can begin until they have served their previous sentences. This these defendants have not done, and what is more, these defendants were not within the jurisdiction of this court when they were tried and as the affidavit here will show. If there is one thing essential, it is that the court must have jurisdiction of the defendants.

Now may I say in support of my argument that under our statute no one may be permitted to be tried and convicted without being in the presence of the jury. Our statute expressly gives to the warden of the penitentiary exclusive jurisidction of every one committed to that prison. How then could defendants be tried while in prison? There was one way and but one way only, that he could be tried, and all courts hold the jurisdiction acquired may only after the prisoner is taken from the warden by and under a writ of habeas corpus. It may be asserted that the presumption is that he was lawfully before the court. That presumption was overcome at the trial of this case by repeated evidence to the effect that he was serving a term in the state prison. That appeared time and again on the witness stand; it appears here (Defendants are in possession of the warden), and I think, if your Honor please, it was an unusual proceeding. They even went into the penitentiary and

got evidence, statements rather, from these defendants without them knowing they had a right to refuse to make any statements. Those statements were introduced on the witness stand, disclosing these defendants were in the custody of prison officials. You can't indict a man as a private [fol. 193] citizen and try him as a convict. That is so well settled that I was astonished that the district attorney would attempt it. That is one of the things we insist upon, if the Court please, that this sentence be made to take effect at the expiration of the terms for which they are serving.

The Court: The case has been determined in this court, it has also been determined in the Supreme Court of the State of Oregon, on the record, or part of it, which Judge King has adverted to. There remains nothing to be done in this court except to follow the plain course of the law, and that is what I am doing.

Wherefore the Petitioner, defendant, prays a reversal of the court below, because of the aforesaid errors and any other error cognizable on review.

Will R. King, Atty. for Petitioner.

[fol. 194] Salem, Oregon, October 29th, 1926.

Service of the foregoing accepted on date above stated by duly certified copy thereof, the same having been certified to by Will R. King, Attorney for Ellsworth Kelley, Defendant and Plaintiff in Error in the foregoing cause.

John H. Carson, District Attorney for Marion County, Oregon. J. H. Van Winkle, Attorney General for Oregon, by Willis S. Moore, Assistant.

[File endorsement omitted.]

[fol. 195] In Supreme Court of Oregon

[Title omitted]

Order Allowing Writ of Error—Filed November 1, 1926

On this 30th day of October, 1926, comes the defendant by his Attorney, Will R. King, and files herein and presents to the Court a petition praying for allowance of a

Writ of Error and Assignment of Errors intended to be urged by him, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedeings may be had as are proper in the premises,

On consideration whereof, the Court does allow the Writ of Error, and orders that the same and bond filed herewith, shall operate as a supersedeas of the sentence and judgment given, and that a transcript of the record, proceedings and papers in this case duly authenticated shall be sent to the United States Supreme Court in order that the said court may inspect the same and do what according to law should be done.

Thomas A. McBride, Chief Justice of Oregon Supreme Court.

Service accepted this 3rd day of Nov. 1926
J. H. Van Winkle, Attorney General of Oregon.

[fol. 196] [File endorsement omitted.]

[fols. 197-202] In Supreme Court of Oregon

Writ of Error—Filed November 1, 1926

United States *for* America, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record, proceedings and judgment in a cause lately pending in the Supreme Court of the State of Oregon, being the highest court of the said State in which a decision in the cause could be had, between the State of Oregon, plaintiff and defendant in error, and Ellsworth Kelley, defendant and plaintiff in error, wherein was drawn in question the validity of a statute of a State, on the ground of its being repugant to the Constitution, treaties or laws of the United States, and the decision was in favor of its

validity; it appears that the said plaintiff in error is entitled to have the said judgment reviewed by the Supreme Court of the United States; and he having presented a petition for a writ of error and an assignment of errors to that end;

And we being willing that error, if any hath occurred, should be duly corrected, and full and speedy justice done to the parties aforesaid, do command you that under your seal, distinctly and openly, you send the record, proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 1st day of November, in the year of our Lord one thousand nine hundred and twenty-six.

G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon. (Seal United States District Court, Oregon.)

[File endorsement omitted.]

[fol. 203] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFF IN ERROR OF PARTS OF RECORD TO BE PRINTED —Filed January 18, 1927

To the Clerk of the Supreme Court of the United States:

In accordance with Rule #11, paragraph 9, of the above Court, Plaintiff in Error gives notice:

That the Points upon which he intends to rely in the above named Court are the Errors assigned and set forth

in the Petition for Writ of Error, as appear in the original transcript of record herein (Print pages —) and

Your are hereby requested to print in the printed transcript of the record all that part of the typewritten transcript as certified to you in the foregoing cause by the Clerk of the Supreme Court of Oregon, as follows: Præcipe herewith, and Record from the Circuit Court.

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Indictment	p. 4
Arraignment	.....
Verdict and Order discharging the jury	32-33
Sentence of defendant	34
Motion and affidavits for Arrest of Judgment	.....
Order denying Motion in Arrest of Judgment	40
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From the Bill of Exceptions in Transcript print:

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Exceptions #24 to 26 inclusive	86-88
Certificate of probable cause	.....
Motion to Amend Bill of Exceptions	.....

Oregon Supreme Court proceedings:

Order of Supreme Court allowing substituted Bill of Exceptions	123½
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Instructions to the Jury 127½
Opinion of Court, Burnett, J 159-167
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Petition for Rehearing: Omit printing of Petition for Rehearing, Exhibit B, except that part of the Petition containing Assignments of Error, pages 1 to 8, inclusive which print except assignments numbered 15 and 16, which omit.
Omit the printing of Exhibit A, except assignment of Error number 16, page 14 and assignments numbered 20, 21, 23, 24, 25 and 27, respectively, pages 17 to 22, inclusive, all of which print.
Order denying Petition for Rehearing 169
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Assignment of Errors accompanying and a *a* part of Petition for Writ of Error ....
Order allowing Writ 195
Writ of Error 197

Will R. King, Attorney for Plaintiff in Error, 530 Chamber Commerce Building, Portland, Oregon.

[fol. 205] Service of the foregoing Præcipe by receipt of duly certified copy thereof accepted at Salem, Oregon, this 12th day of January, 1927.

John H. Carson, as District Attorney for Marion County, Oregon.

[fol. 206] [File endorsement omitted.]

[fol. 207] IN THE SUPREME COURT OF THE UNITED STATES

DESIGNATION BY DEFENDANT IN ERROR OF ADDITIONAL PARTS OF RECORD TO BE PRINTED—Filed February 24, 1927, by leave of Court granted February 21, 1927

To the Honorable the Clerk of the Supreme Court of the United States:

The defendant in error above named respectfully requests you to print in the record herein, in addition to the matters

designated by plaintiff in error herein, the following parts of the typewritten transcript as certified to you herein by the clerk of the Supreme Court of Oregon, to-wit: The whole of the transcript on appeal of the plaintiff in error from the judgment in the Circuit Court of the State of Oregon to the Supreme Court of the State of Oregon, which includes the documents shown to have been filed in the Supreme Court of Oregon on April 28, 1926, and April 10, 1926, being the only documents filed in this cause in the Supreme Court of Oregon on said dates.

The whole of the bill of exceptions appearing in the transcript.

It is particularly intended hereby to have printed in the record herein all of those things necessary to make the judgment roll as defined by Oregon Laws, Section 1582, reading as follows:

[fol. 208] "Immediately after the entry of judgment, the clerk must prepare and annex together the following papers, which constitute the judgment roll:

1. The indictment and demurrer, if there be one;
2. A copy of the journal entry of the plea, the trial and verdict, and of any order involving the merits and necessarily affecting the judgment;
3. A copy of the journal entry of the judgment;
4. The bill of exceptions, if there be one.

And in all cases the clerk must complete and indorse such judgment roll in the manner prescribed in subdivision 3 of section 208 of the Code of Civil Procedure,"

and as included in the transcript on appeal hereinbefore referred to.

John H. Carson, One of the Attorneys for Defendant in Error.

[fol. 209] State of Oregon,
County of Marion, ss:

I, Will R. King, hereby certify that due and legal service of the within præcipe was made and effected upon me in Marion County, Oregon, on this eighteenth day of February, 1927, by receiving a true copy thereof, duly certified to be such by John H. Carson, one of the attorneys for defendant in error; I further certify that I am a resident and

an inhabitant of the County of Multnomah, State of Oregon, and that I am one of the attorneys of record for plaintiff in error.

Will R. King, Attorney for Ellsworth Kelley.

[Endorsed:] In the Supreme Court of the United States. Ellsworth Kelley, Plaintiff in Error, vs. The State of Oregon, Defendant in Error. Præcipe. John H. Carson, District Attorney of Marion County, Oregon, one of the attorneys for defendant in error.

Endorsed on cover: File No. 32,394. Oregon Supreme Court. Term No. 827. Ellsworth Kelley, plaintiff in error, vs. State of Oregon. Filed January 11th, 1927. File No. 32,394.

MAR 21 1927
WM R. STANSBURY
CLERK

SUPREME COURT

OF THE

UNITED STATES

October Term, 1926

No. 827

ELLSWORTH KELLEY,
Plaintiff in Error
vs.
THE STATE OF OREGON,
Defendant in Error.

In error to the Supreme Court of the State of Oregon.

BRIEF OF THE PLAINTIFF IN ERROR

WILL R. KING, Portland, Oregon,
Attorney for Plaintiff in Error.

JOHN H. CARSON, District Attorney, Marion County, Salem, Oregon,
Attorney for the State of Oregon.

WILLIS S. MOORE, Salem, Oregon,
Of Counsel for the State of Oregon.

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SUPREME COURT

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October Term, 1926

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LLSWORTH KELLEY,
Plaintiff in Error
vs.
HE STATE OF OREGON,
Defendant in Error.

error to the Supreme Court of the State of Oregon.

BRIEF OF THE PLAINTIFF IN ERROR

ILL R. KING, Portland, Oregon,
Attorney for Plaintiff in Error.

OHN H. CARSON, District Attorney, Marion County, Salem, Oregon,
Attorney for the State of Oregon.

ILLIS S. MOORE, Salem, Oregon,
Of Counsel for the State of Oregon.

For convenience in this brief we refer to Plaintiff in Error as, "Plaintiff". As counsel for Plaintiff, the statement made in the brief of the State of Oregon, pages 1, 2, 3 is adopted as a correct statement of the facts, which reads as follows:

"Ellsworth Kelley, plaintiff in error, James Willos and Tom Murray were jointly indicted by the Grand Jury of Marion County, Oregon, for the crime of murder in the first degree under the provisions of Section 1893, Oregon Laws, reading as follows:

> "If any person shall purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree."

"At the time of the commission of the crime set forth in the indictment, plaintiff in error and the two others accused with him were prisoners in the Oregon State Penitentiary at Salem, Oregon, and the crime was committed by them in their escape from that institution. John Sweeney, named in the indictment, was a guard at the institution and was slain in his attempt to prevent the escape.

"Plaintiff in error was arraigned upon the indictment in the manner prsecribed by the laws of Oregon, and upon such arraignment he entered a plea of not guilty to the indictment. The cause was then set for trial as to plaintiff in

error and James Willos jointly indicted with him. The record shows that the cause came on regularly for trial, the plainitff in error at all stages of the trial appearing in person and by Hon. Will R. King, one of his attorneys. Upon trial the jury returned into court a verdict of guilty as charged in the indictment without recommendation. Thereafter, and on Friday, October 30, 1925, plaintiff in error was sentenced to pay the penalty of death, as by the law provided. Judgment was entered on the same day.

"Notice of appeal to the Supreme Court of Oregon was filed by plaintiff in error in the Circuit Court of the State of Oregon for the County of Marion on November 19, 1925, thereby initiating a proceeding to review the judgment in the cause in the Supreme Court of Oregon.

Official report of the question in the Court below will be found 118 Oregon page 397 - 247 Pacific 146

Points relied upon for jurisdiction

"Upon the appeal the Supreme Court of Oregon affirmed the judgment of the trial court. State vs Kelley 118 Ore. 397; 247 Pac. 146. After the denial of two petitions for a rehearing by the Supreme Court of Oregon, Plainiff in error brings this cause to the Supreme Court of the United States upon writ of error allowed by the Chief Justice of the Supreme Court of Oregon."

It will be obsreved from the foregoing state-

ment that the Plaintiff Kelley with others, was indicted under the statute of Oregon as a private citizen charged with the commission of murder, **not as a convict,** but charged as any citizen might be charged with the commission of a crime. Brief, Ex. B.

The points upon which we rely giving this Court Federal jurisdiction are stated on pages 138 - 141 of the Transcript, supplemented by points on pages 135 - 137 of Transcript.

In the Transcript **it might be inferred** that these points were raised only on a petition for re-hearing. Such is not true. Attention is called to Exhibit "A", as will be found by inspection of the Transcript to be **Appellant's Brief on appeal in the Court below,** where the questions were raised. But, for some reason better known to the writer of the opinion in the Supreme Court of Oregon than can be expressed here, the Federal questions were not discussed.

It's failure of discussion was no fault of Plaintiff. The question was raised in the brief on appeal.

Due process of law has never been exactly defined, but the question is determined upon the circumstances of the case. Among all the tests that the court has applied on the question, the one that stands out and is without controversy is that property taken without a hearing as to the right to take it is not due process of law.

The constitution of Oregon provides (Sec. 10, Art. 1) that every man shall have remedy by due process of law for injury done him in his

person, property or reputation. Due process of law in that instrument means the same thing *as the phrase in the Constitution of the* United States. The only distinction is that the Federal Constitution is addressed to the States, and the State constitution is addressed to the state government and its citizens. The identity of the phrases in the two instruments is announced by the Supreme Court of Oregon in these words:

> "No person can be deprived of his property except by due process of law, and an attempt upon the part of the legislature to authorize one person to take and dispose of the property of another, and thus summarily deprive him of it, would not be 'due process of law', within the meaning of that expression as used in the constitution of the State and of the United States."
>
> "Steward v Hunter, 16 Or. 65.

The phrase in the two instruments has a common origin, is traced by the same history and founded upon the identical principle that draws a line between the law of the land and arbitrary power. The barons did not discover this principle. It has been recognized in all governments pretending to be free and enlightened, and by all statesmen of the world. It is impossible, therefore, for the state government, through its officers to deprive its citizens of due process of law in contravention of its own constitution, without at the same time depriving him by its action of the due process of law in

violation of the Federal constitution. The same action violates both constitution. And the fact that the state court fails to enforce its own constitution in that respect does not affect the duty of the Federal Court to enforce the Federal constitution. And the fundamental requirement in proceedings that are judicial, or quasi-judicial, is that the party proceeded against shall have an opportunity to be heard. A distinction is made in this court between proceedings that are judicial, as in criminal cases, and proceedings under eminent domain and taxation. We therefore confine our attention to the former class of cases.

It is elementary that where questions are raised before the highest Court of a state, as in this instance, from which this **Writ of Error** has been taken, it is not essential to the jurisdiction of this Court that the lower Court discuss Federal questions. To hold otherwise is to deprive one of his Constitutional rights.

Unhappily, it seems that the highest court of the states too frequently find it convenient to omit a discussion of Federal questions, and thusly, prevent appeals, having a loss of memory respecting legal rights; and in doing so, overlook thereby the fact that the humblest citizen of the land is entitled to the protection of the highest Court of the land, respecting his life and liberty, regardless of his humble situation.

INALIENABE RIGHTS

It is assumed unnecessary to cite authorities upon that subject.

It is an elementary principle of law, well settled by the Declaration of Independence, to the effect that **each and every citizen of this Republic has an inalienable right to life, liberty and the pursuit of happiness.** Previous to this great document this right was derived from some superior power of the land; but to puncture the tire of this unjust and fallacious policy, **our government** settled from that date and henceforth that every citizen has an **inalienable right** to life, liberty and pursuit of happiness endowed by the Creator, **and not derived from Kings or Potentates of the land.**

As stated in the transcript, pages 156-7, having reference to pages 138 - 141 of Transcript, the points upon which the Plaintiff relies on errors assigned as set forth in Writ of Error, are as follows:

"Error is also predicted upon the Statutes authorizing executions under which defendants, James Willos and Ellswort Kelley, respectively, have been sentenced as being void, not having been enacted in conformity with either the Bill of Rights of the Constitution of the United States or of Article One of the State of Oregon.

"(fol. 168H) (20) The court erred in entering judgment fixing date of execution prior to expiration of sentence of James Wllios in San Quentin State Prison, California, and prior to

subsequent sentences including the sentence of Ellsworth Kelley, rspectively, in the Oregon Penitentiary, respctively. (Oregon Code. Sec 1576); and for the further reason that defendants were ~~not~~ within the jurisdiction of the warden of the Oregon State Penitentiary only.

"In this connection attention is called to the affidavits of (fol. 168i) the respective defendants in this record to the effect that throughout the trial that each were under the charge and in control of the Deputy Warden of the Oregon State Penitentiary, and not under the charge of the Sheriff.

"The court erred in entering judgment that the defendants be hanged prior to the expiration of the sentences for which they were serving in the Oregon State Penitentiary, in that under Sec. 1576 Olson's Oregon Code - under the evidence offered in which to serve and the sentence imposed upon them and each thereof, to the effect that they and each thereof must serve a certain time in the Oregon State Peniteniary and then on date fixed be hanged by the neck until dead.

"The above statute provides in effect that when one is confined in a state prison convition for a crime subsequent to his incarceration therein the sentences following that may be imposed, when convicted of a crime, shall begin at the expiration of his former sentence and it is hereby accordingly alleged that no sentence can be imposed without violating the 14th Amend-

ment of the Constitution of the United States to the effect that no one shall be deprived of his life and liberty without due process of law, which rule of law has been in effect ever since the days of the Magna Charta and the Subsequent Bill of Rights of 1689, including the (fol. 168j) Bill of Rights, incorporated in the fundamental laws of our land, including those of Oregon.

"Magna Charta (1215 A.D.S. 4p
"Bill of rights (1628 A.D.) Par 5, 9.
"Blackstone (Book 4, Star page 186 says:

> "There is one species of homicide (se defendo) where the party slain is equally innocent as he who occasions his death; and yet this homicide is also excusable from the great universal principle of self preservation, which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish. (Note: (See also Grotius herein quoted.)

(fol. 168k) (23) The court erred in not giving the instruction requested in exception No. 19 (Bill of Exceptions, p 24) as follows:

"I instruce you, that the right of self defense is never waived, and that it is within your province if you find under the circumstances in this case that the state has not sustained its allegations beyond a reasonable doubt, you may find the defendant not guilty.

"(24) The court erred in not giving instruction No. 23, (fol. 1681) as requested by counsel for appellants, James Willos and Ells-

worth Kelley, as follows:

"I instruct you, ladies and gentlemen of the jury, that defendants are on trial charged with having killed John Sweney and no one else. Whether any other person was killed or injured on the occasion may be taken into consideration including how he may have been killed, or by whom, may only be considered by you as one of the incidents or circumstances connected with the killing, if anyone was killed, in determining who killed John Sweney, and who, if anyone, may have aided or abetted therein.

"(25) The court erred in not giving instruction No. 24, (referred to in Bill of Ex. p. 45, 46) Tr. 86, as requested by counsel for appellants, James Willos and Ellsworth Kelley, as follows:

"I further instruct you that under the law of the land, under the fundamental laws, National and State, under which we are governed, it is provided that cruel and unusual punishments, shall not be inflicted and if you find under the evidence adduced that cruel and unusual punishments had been inflicted upon defendants, or either of them, and that under methods and procedure in general use in the Oregon State Penitentiary defendants or either of (fol. 168a) them had cause to fear repetitions thereof, at great risk of bodily harm, which includes enforced ill health to body or mind by reason of methods alleged to have been used, or that may have been used with respect to defendants with-

in a reasonable time prior to the alleged break of defendants from said prison, and that defendants were living in enforced fear and belief of unlimited repetition thereof, and that escape was the only practicable means of avoiding such believed great bodily harm, if it was believed, then you may take such consideration in arriving at a verdict, or verdicts, in this case." "(fol. 168n) (27) The court erred in not giving instruction referred to in Exception No. 26, (Bill of Ex. p. 46) Tr. 87 which read as follows:

"The right to qualify a verdict of murder in the first degree or guilty of murder in the first degree by adding the words "we recommend life imprisonment" is thus conferred upon the jury in all cases of murder in the first degree. The law does not itself prescribe any rule defining or circumscribing the exercise of the right, but commits the whole matter of its exercise to the judgment and conscience of the jury. This being the law, you are not limited in your deliberations to the testimony adduced at the trial; nor is it dependent upon mitigating or palliating circumstances, you are accorded the privilege, under the law, of making such recommendation for whatever reason your conscience may dictate; and if after taking into consideration the entire evidence, whether such evidence shall be sufficient in your judgment to establish the insanity defense relied upon beyond a reasonable doubt or not, you are at liberty to take into consideration any or all evidence, if any, adduced

for that purpose in determining whether in the exercise of your discretion or conscience with reference (fol. 1680) to such recommendation, you may return a verdict with recommendation for life sentence as I have stated, or disregard the same and return such verdict whether for or without a recommendation of life imprisonment. And in this connection, I instruct you, that as to how far considerations of age, sex, illness, if any, or mental impairment, if any, or intoxication, of whatever nature or kind, if any, or mental impairment, if any, or human passion, or weakness of clemency, or the irrevocableness of an executed sentence of death, or an apprhension that explanatory facts may exist which have not been brought to light, or any other consiredation whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, all of which committed by the constitution of this state and legislative enactment based thereon to your sound discretion and to your sound discretion alone." Winston v 172 U. S. 302."

Supplementing this are the errors assigned in the petition for rehearing, together with the second petition for rehearing appearing on page 134 - 143 inclusive of transcript.

The writer is not unconscious of the holdings to the effect that where a Federal question is raised only on petition for rehearing, that is not sufficient. But in that connection, atten-

tion is especially invited to the fact that the Federal questions were first raised by petition for rehearing and brief in the Court below, as appears in the Transcript on pages 135 - 137, the parts of which material to this case, read:

THE COURT ERRED

"In holding that the Court would not notice or decide whether or not the Court below erred in its instructions defining robbery. The particular instructions are the three set out in full in the brief filed herewith in support of this motion.

(fol. 168b) 2. In holding that because the said instructions were not excepted to by the appellants the Court would decline to notice them.

3. In holding that the rulings of this Court requiring exceptions to instructions, or other errors, were applicable to the instructions here complained of.

4. In not holding that no exception was required to give this Court jurisdiction to hear and determine the question of error assigned, because the error was one that could not be waived by the appellants.

5. In not holding that each of the said instructions was reversible error, and in not reversing the judgment by reason thereof.

6. In admitting evidence the stenographic report of the questions and answers of Ellsworth Kelley and James Willos, taken at the penitentiary, over the objection of the appell-

ants' counsel that there was no evidence that the said statements were voluntary.

7. In holding that the said statements were voluntarily made, not appearing in the bill of exceptions.

8. In holding that it would be presumed that there was other evidence that the statements were voluntarily made, not appearing in the bill of exceptions.

9. In holding that it was the duty of the appellants, if (fol. 168c) there was other such evidence, to have it incorporated in the bill of exceptions, instead of holding that it was the duty of the District Attorney, if there was any such evidence, to see that it was incorporated in the bill of exceptions.

10. In holding that the said statements did not constitute confessions, but only admissions, and in holding that the exculpatory matter in the said statements reduced them from confessions to admissions.

11. In not holding that the facts stated by each of the appellants in their said statements were acts involving and implying the guilt of the appellants of some degree of the crime charged and of an element of such crime.

12. In holding that the admission by both of the appellants that they planned together with Jones and Murray to escape from the penitentiary was not a confession of an element of the offense charged.

13. In holding that the failure of the Dis-

trict Attorney, when the evidence of each appellant was taken at the penitentiary, to inform the appellants of their right to counsel and of their right not to make any statements, and that if one was made by them it could be used against them on the trial, did not make the statements so procured incompetent and inadmissible as evidence against them on the trial.

(fol. 168d) 14. In not holding that the proceeding taken at the penitentiary was extra-judicial and extra-legal and void for every purpose, and the evidence so procured incompetent to be used against the appellants, or either of them.

17. In sustaining the trial court's refusal to give the instruction requested in appellants' assignment number 26 (Bill Ex. p. 53; quoted on p. 22 of brief of appeal.)

18. In sustaining the trial court's refusal to give the instruction requested in our assignment number 24 on appeal (Bill Ex. p. 415) Tr. p. 86 to the effect that if found that cruel and unusual punishment was being inflicted upon them with a reasonable time prior to the prison escape in which Sweeney was killed, and defendants were living in enforced belief of continuous repetition thereof, and that escape was the only means of avoiding believed great (fol. 168e) bodily harm, the jury could take same into consideration in arriving at their verdict, or verdicts, etc.

19. In holding that the only testimony bear-

ing upon question involved in the last error above assigned (number 18) was limited to that stricken out, given by Tom Murray, mentioned on page 977 of opinion, as our fifteen assignment of error; and in not considering in connection therewith the testimony given at the trial of both Kelley and Willos, defendants, as disclosed by reference thereto on page 52 of Bill of Exceptions, and as set out on pages 55 to 77 inclusive, in Bill of Exceptions.

20. In application of the usual rules and law applicable to the plea of self defense, where the controversy, or combat, is immediattely between individuals to the facts disclosed by the testimony given by defendants, Kelley and Willos respectively, in which there was presented to the jury for consideration a long series of events disclosing cruel and unusual treatment by which defendants were placed in constant fear of great bodily harm and ultimate death, and in not holding there was error in the court's refusal to instruct the jury relative to the law applicable to the conditions thus presented by the evidence.

21. In not distinguishing between condition affecting accused where the treatment cruelly invoked upon the person of defendants incarcerated within prison walls under the law and usual enforced restrictions, where the (fol. 168f) compliance with the law and usual requirement of first retreating to the wall, etc., usually invoked in ordinary and usual homicides, before the killing was, by the confinement within prison walls made impossible.

22. **In holding and recognizing that the defendants were within the jurisdiction of the trial court when tried; and in not holding that under the evidence adduced, as disclosed by the record, defendants, when tried, were within the exclusive jurisdiction of the Warden of the Oregon Penitentiary.**

23. In holding that the execution of the sentence imposed could be made effective, **prior** to the expiration of the terms of imprisonment for which confined as disclosed by the record."

The Court below uncermoniously declined to consider any of these questions, whereupon a second petition for rehearing was filed and the following assignments of error were made.

"1. That the **six** judges (7 constituting the Court) who passed upon the petition for rehearing had no legal authority to decide the questions therein raised, one of the judges, Judge Rand, who heard the case not having participated in the decision on the said petition for rehearing, and not being present on the bench in court when the said petition was denied.

"2. That neither in the original opinion handed down, nor in the order denying the petition for rehearing, did the Court state, consider or decide that the instructions given by the lower court, referred to in the first petition for rehearing, were or were not erroneous.

"3. That neither in the original opinion nor in the order denying the petition for rehearing has the Court stated or decided the question

raised in the original hearing, and in the petition for rehearing, that the objections against the said instructions urged were of a class that required an exception in the lower court.

"4. In the order denying the petition for a rehearing it has not been decided that the lower court had jurisdiction of the person of the defendants during the trial, it appearing from the record that the defendants at the time of the trial were in the legal custody of the executive department of the State, and it does not appear from the record that the Court, by any process, obtained the custody of the defendants for the trial; the point on this being that the defendants could not be legally tried in the court **when not in the custody of the court** and subject to its orders, and where the defendants, **being in the custody of the executive department, could not make a voluntary appearance so as to give the lower court jurisdiction.**

(fol. 171) And the defendants in this petition renew all of the points made in the original hearing and in the first petition for rehearing.

This petition was also denied without opinion, whether to prevent a federal question being involved or for other reasons, does not appear. Such procedure we submit is, to say the least, unfair, especially in a capital case.

Furthermore, the Plaintiff (defendant) was not given the benefit of any of these instructions. On the other hand the lower Court violated all the fundamental principles of law in the instructions, the substance of which was, as

stated in the brief, Exhibit "A", to permit a defendant to be executed by his own consent. All that is necessary to do so is to read Ex. "B"."

It is earnestly urged upon this Honorable Court that the brief on petition for rehearing, copy of which is furnished to each member of the Court, be read. (Ex. B) **This Plaintiff (defendant), not able to pay for a reprint of the brief furnished on rehearing. Hence, this request that the Court accept these copies without reprinting.**

Note also the charge of the District Attorney appearing in the Associated Press dispatches (where District Attorneys usually try their cases). I submit that a **federal question is here presented and being a federal question ethically presented under the rules of the Court.** The Court below, however, whether intentionally or otherwise, avoided considering the questions which we here earnestly present. A sample of unfairness appears in page 404 of the opinion 118 Ore. Report dictate in which it is stated that we contended to the effect that Willos when on the witness stand should not have been questioned, when as a matter of fact no contention of that nature was ever raised and in that regard the opinion is absolutely in error. It is unfortunate that State Supreme Courts will avoid all federal questions in order to prevent a helpless individual from saving his right on appeal in the highest Court of the land. But we are here with the question as we deem it pro-

perly presented and it only requires a reference to our briefs as hereto alluded to, to demonstrate that fact.

FEDERAL QUESTION NO. 1.

The trial court did not obtain the custody of the person of the Plaintiff in error, hereinafter referred to as "Plaintiff." The trial was had without such custody. He was at all times during the trial in the custody and under the dominance of the Warden of the State Penitentiary and of the executive department of the State government. The opinion of the Oregon Supreme Court clearly so states.

The court, under no circumstances, had any jurisdiction of his person or of the cause. This jurisdiction is never waived. That he was under such jurisdiction clearly appears from the record and opinion of the Court from which this appeal is taken, notwithstanding the juornal entry of the proceedings state that he was in the custody of the Sheriff. This statement is refuted by the proof at the trial. The evidence adduced makes it clear that the plaintiff was in the custody of the Warden of the Penitentiary, an executive arm of the State government

In the case of State vs Walton, **51 Ore. 574,** which follows the decisions of the Supreme Court of the United States, as therein cited makes it clear that all matters disclosing jurisdiction should affirmatively appear of record. That does not appear here.

The case of State vs Wilson, 38 Conn. 126,

in which a presumption was invoked is not applicable in this case. The entire record, as stated, discloses that at the time of the trial, Kelley was prisoner in the custody of the Warden of the Oregon State Penitentiary; That the commitment was the authority under which he was held.

There is no statute of Oregon authorizing the Sheriff to arrest a prisoner in the penitentiary and take him from the custody of the Warden, the Warden being the general officer in charge of the State prison. To obtain the jurisdiction of such a prisoner, the Court must, therefore, issue a writ directed to the officer having the accused in legal custody.

It is unnecessary to make an inquiry into the form of the writ or as to what its legal designation or title may be, since the Warden holds the prisoner by virtue of the legal commitment of a court. From this it must follow that he could not legally surrender his prisoner except upon writ of a court having jurisdiction to issue it. There was no such writ, or any writ directed to him, yet it will not be questioned but that he was in charge of one of the subordinates of the executive department of the government. That clearly appears from the testimony taken in the trial of the case, as disclosed by the evidence in the Transcript above cited.

The record shows that the defendant was present in court in person and by his attorney during the trial. There can be no presumption

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that he was there voluntarily. Prisoners do not come into court voluntarily, as a rule, and this is no exception to the rule. As stated, the record discloses that he was in the penitentiary and occupied a certain cell. The record is silent as to any warrent or other legal document bringing him into court further than the **convenient court expression** that he was there in charge of the Sheriff. True; persumably, as is always the situation, a Sheriff is present in the trial of any criminal case, whether the crime be high or low. It is manifest from the record that he was there by the Warden's will.

Here we have a situation of the Defendant in charge of the Warden, under an executive department, being tried in a Court without anything in the record disclosing the authority or jurisdiction of that Court to try him. If we must forget all laws and go back to the ancient days of the trial of Charnock and others, and use the technicalities of the law then in vogue, and for which the Declaration of Independence and the Constitution of the United States intended to cure, then we might call this a valid trial; otherwise, otherwise.

The Warden was not a party to this trial. He was not subject to the order of the Court, and could, without being guilty of any contempt of Court, subject the defendant to restraint and to the influence of his relation in making his defense and giving his testimony. (and going outside of the record, for which I apologize, much of this was done in this case). He was

the Warden's prisoner, not the Court's prisoner. The Warden brought him to Court, and as affidavits disclose, sat behind him during the trial. The prisoner did not have that freedom of mind and will in making his defense, which is always essential to a fair trial. All presumptions should be resolved and are resolved essential to a fair trial of the prisoner, except where a record discloses conditions to the contrary, and the record in this case disclose contrary conditions.

In legal view, when measured from the standpoint of the fundamental rights of the Plainttiff and keeping in mind that he was being tried as a private citizen, yet at the same time not a private citizen but an inmate of the State Penitentiary, **it must be admitted that he was absent** during the trial. He had not that hearing which constitutes DUE PROCESS OF LAW.

The journal entry recites that he was in charge of the Sheriff. This recitation discloses that he was not in charge until being sentenced. The convenience of Courts in recitations of this kind should be fully understood, but rebutting this convenience is the fact that this recitation is disputed by the evidence upon which defendant was convicted.

It is high time that Courts should take judicial knowledge of the fact that **Courts** are jealous of keeping their records in proper shape, **yet that in capital cases such as this,** Courts should not **by record** execute men who the facts as de-

veloped at the trial are guiltless of any intentional crime.

I here repeat that the record of Defendant being in charge of the Sheriff does not appear until the sentence is imposed on which Plaintiff's life is to be taken.

Attention is again called to the case of State vs Walton 50 Oregon 142, 51 Oregon 574 in which the presumption was not invoked in favor of taking the life of defendant, which follows the decision of Crain vs United States and authorities there cited and as cited on page 155 of 50 Oregon Reports.

A man on trial for his life is, of course, under such restraint of his person by the Court as will insure his attendance in Court and prevent his escape: In his trial he must be free of mind and be afforded by the Court unrestricted liberty to make his defense. Courts should be recognized as such and not as autocrats, and requiring that prisoners should be relieved of shackles during trial in order that they might be able more freely to think and defend their cause. But to recognize the proceedings in this case, is to hark back to the conditions existing before court procedure became thus civilized.

Recurring again to the main point, the Plaintiff in error, by being at all times a prisoner of the Warden, he must have known and felt that he was under the prison discipline, which is a mental as well as a physical restraint on his free will, his **libre arbitre.**

The question presented is a Federal ques-

tion under the Fourteenth Amendment of the Constitution of the United States.

Under this record it does not appear that the Warden of the Oregon State Penitentiary ever surrendered the custody of the Defendant (Plaintiff in error) to the Court. There is no presumption that he did, **for that would be to presume that he did what he had no legal authority to do,** without proper writ or order from the Court, which does not appear of record, and which, in fact, does not exist.

SELF PRESERVATION

The Right of Self Defense under unusual Circumstances.

By reference to the Brief on Petition for Rehearing, (Exhibit "A") copies of which are supplied for each member of the Court, **and so supplied by reason of the poverty of the Plaintiff herein, essential to escape the enormous expense of reprinting,** it will be observed, pages of which are 62 - 68. — attention is invited to these fundamental principles as quoted on pages 62 - 68 of exhibit "B", Re "Self Preservation."

"There is one species of homicide (se defendo) where the party slain is equally innocent as he who occasions death and yet this homicide is also excusable from the great universal principle of self preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish."

And as stated by Grotius in his, "Rights of War and Peace" (Classic, 1901 by M. Walter

Dunne, publisher) about three hundred years ago:

"Xenophon says, that every animal knows a certain method of fighting without any other instructor than nature. In a fragment of Ovid's called the Art of Fishery, it is remarked, that all animals know their enemy and his means of defence, and the strength and measure of their own weapons. Horace has said, 'the wolf attacks with its teeth, the bull with its horns.'

"Ulphan observers that Causius says it is lawful to repel force by force, and it is a right apparently provided by nature to repel arms with arms with whom Ovid agrees, observing that laws permit us to take up arms against those that bear them." The foregoing is the state of the situation in general terms.

Here is a case of unusual importance in which the defendants incarcerated in prison with an insane guard on the wall, shooting into the cells surrounding them, as to which the evidence is unquestioned. They were slated to be shot on a **slightest** provocation, such provocation not being known to them. On this feature the evidence is not disputed. It is a case where to remain within the prison walls might at any moment have meant sudden death, as in the case of Ogle, who the undisputed evidence discloses was shot in the back, and the killer of whom, under the record, is still at large with the presumed consent of the District Attorney who appeared in this case and charges the writer with presenting an **atrocious** defense.

Imagine one in prison with the surroundings described by the testimony of Kelley, Tr. page 68 - 74 also 146 also Exhibit "B", pages 64 - 69 inclusive, and then ask what would a reasonable man do under such circumstances. We are confronted with a question, not of self defense, in the ordinary sense but of the right of **self preservation** as presented in the case of Laidlaw V. Sage, 158 NY. 73 52 NE. 679 - 44 LRA 216, in which it was held that Russel Sage was not liable for damages because of having thrust a third party between himself and a bomb.

The principles are so elementary that few decsions may be found upon them, making it necessary to refer to Blackstone as above quoted and to go further into history as citing Grotius where we find the following langauge:

"There is a celebrated passage in Cicero's speech for Milo, in which, justifying recourse to force in defence of life, he bears ample testimony to the feelings of nature, who has given us this law, which is not written, but innate, which we have not received by instruction, hearing or reading, but the elements of it have been engraven in our hearts and minds with her own hand: a law which is not the effect of habit and acquirement, but forms a part in the original complexion of our frame; so that if our lives are threatened with assassination or open violence from the hands of robbers or enemies, any means of defence would be allowed and laudable. He proceeds, reason has taught this to the learned,

necessity to the barbarians, custom to nations and nature herself to wild beasts, to use every possible means of repelling force offered to their bodies, their limbs and their lives. Caius and Lawyer says, natural reason permits us to defend ourselves against dangers. And Florentinus, another legal authority, maintains, that whatever any one does in defence of his person ought to be esteemed right. Josephus observes, that the love of life is a law of nature strongly implanted in all creatures, and therefore we look upon those as enemies, who would openly deprive us of it."

The mere right of self defense does not mean that which is commonly understood, of being on a street corner and defending oneself. In this particular case it means more than that. It means one who might be imprisoned and within the walls of that prison might know that he is to be killed and feel that he has the right of self defense. A man on the outside of the walls has the power to escape. **The one on the inside does not have that power.** This theory of defense in **the eyes of the usual District Attorney amounts to but little.** But in the eyes of one who can see above a ten foot precipice, it means much. Demonstrative of this premise is the fact that this **defendant has not received a decision under due process of law, measured by the standard of the Fourteenth Amendment of the Constitution of the United States.** Should Courts doge it? (of 1500 years ago) Is the Constitution a farce?

Under the laws of England, the House of Parliment, any man might be taken from his home and thrown into the dungeon and it would be a trial by due process of law, the "Doge" repeated!

The restriction of the Magna Charta were restrictions upon the King of England. The unwritten Constitution of England amounts merely to restrictions upon the King, that was all there was to it. Parliment could do anything, but when the Revolutionary war was fought in this conutry, a different rule was instituted. This country is a different country. The Declaration of Independence meant something here but not over there.

It was then (after revolutionary times) expressly declared that **any and all** men were endowed with certain **inalienable rights,** among which were, life, liberty and the pursuit of happiness. For the enforcement of this the **Fourteenth Amendment** to the Constitution of the United States was adopted. It may be asked, what is the application here.

One of the many points is, **here we have a citizen of the United States.** States may be forgotten when a citizen of the United States becomes involved.

DUAL CITIZENSHIP

One may be a citizen of the State and at the same time a citizen of the United States. In this instance, while Kelley is a citizen of the **State, he is at the same time a citizen of the**

United States. The United States is necessarily interested in protecting its citizens. It becomes a duty of the United States so to protect them.

As disclosed by the testimony in the Transcript, Kelley was in a cell in the Penitentiary of Oregon. An insane guard was on the wall. This insane and other guards were firing at the various cells surrounding Kelley. As conceded, the undisputed testimony discloses that Kelley was in danger of being killed at any moment. As a result, Kelley attempted to escape. In order to escape it may have been necessary to kill a guard.

This, accordingly, presents the question whether the jury could consider the point as to whether he was justified in so doing. This was clearly a question for the jury to consider. The jury should have a right to consider this feature, in reference to which the quotation heretofore cited from Grotius is herewith invoked. But the instructions bearing upon this feature were refused. This Honorable Court having jurisdiction of this case, as of course, may consider all these questions. That such is so is too elementary to need citation of authority.

Proper instructions were asked on this feature but not given and **may it not be overlooked** that the instructions given by the judge of the lower Cuort overlooked every feature of this nature.

AUTHORITY OF STATE

As above stated, in this Republic we have what might be termed a dual citizenship. Each and all are citizens of their respective states. At the same time each and all are citizens of the United States.

As disclosed in Exhibit "B", herewith submitted, the Governor of the state is restricted in his power. To place one in cells in the "Bull Pen," where he is deprived of the liberty of all communication with the outside world is, under the constitution of the State, a deprivation of his life, liberty and pursuit of happiness.

The State statute forbids cruel and unusual treatment, yet he may be deprived of that privilege if the prison officials may be permitted to shackle him to cells and deprive him of his life, liberty and pursuit of happiness which the statute prohibits and which statute ~~only~~ intends not to deprive him of his liberty. Brief, Ex. B.

The whipping post was abolished in Oregon by special statute, yet other methods more cruel have been adopted. One of these methods, as more fully discussed, appears in Exhibit "B", copies of which are furnished to this Honorable Court.

Recurring and returning again, the writer desires to impress upon this honorabde Court the importance of this feature, that when an attack was made upon the prisoners, as appears by the indisputed evidence of firing into the "Bull Pen," the threatened killing of these defendants, de-

Supreme Court

OF THE

United States

October Term, 1926

No. 827

ELLSWORTH KELLEY,
Plaintiff in Error,
vs.
THE STATE OF OREGON,
Defendant in Error.

In Error to the Supreme Court of the State of Oregon.

BRIEF OF THE PLAINTIFF IN ERROR ON PETITION FOR REHEARING

The Court uses this language in its opinion:

"Another assignment of error is to the effect that the plaintiff-in-error was constantly in the custody of the warden of the penitentiary, inside and outside of the court room during the trial. It is argued that he was entitled to be free from any custody in order that he might fully make his defense,

> and that this deprived him of due process. It is a new meaning attached to the requirement of due process of law that one who is serving in the penitentiary for a felony and while there commits a capital offense must, in order to secure a fair trial, be entirely freed from custody."

It was not argued that the defendant was entitled to be free from any custody in order that he might fully make his defense, and that this deprived him of due process. We agree that it is a new and would be an untenable assignment to say that a defendant, in order to secure a fair trial, be entirely freed from custody. That was not our point. The point is stated and argued in our brief, on page 20, et seq.,

Federal Question No. 1. A careful reading of that will show that our contention was not that he should have been free from any and all custody, but that he should have been in the custody of the court, and not in the custody of the warden of the penitentiary.

The question, therefore, for the Court to decide, and which it has not decided, because it has misapprehended the point, is this: Is it due process of law when a trial is had when all the time the defendant is in the legal custody of the warden of the penitentiary, an officer of the executive department of the state, and under the legal dominance, mental and bodily, of the warden, and not in the legal custody of the court or under the protection of the court at any time? That is the question we propound for decision.

The opinion of the Oregon Supreme Court so states. The record in this cause shows, by certified copy, the commitment to the warden of this defendant by regular order of a court. Nothing in this record shows that any other order of the court, or any process of any court, took the defendant from that custody. And, as argued on page 20 of the brief, this amounts to a question whether or not he was within the jurisdiction of the court to try. We refer again to the argument in our brief on that point for a clearer presentation of the question than the Court has given in its opinion. State v. Wilson 38 Conn. 126, and all authorities we have been able to find hold that it is essential to the jurisdiction of the court that the defendant in prison must be taken from the custody of the executive department (its warden of the prison) and placed in the exclusive charge of the court. It was there held that such is presumed in the absence of a showing to the contrary. This showing appears of record from the evidence produced by the state. Besides as held in State v. Gilbert, as early as 1883, (printed in 1910, 55 Oregon Reports) followed in State v. Walton, 50 Oregon 142; 13 L. R. A. (N.S.) 811, citing Crain v. United States 162 U. S. 625 that such jurisdictional matters **must affirmatively appear of Record,** which as indicated does not appear in the case at bar.

Nor did we argue, as implied in the opinion, that a defendant cannot be tried and convicted of a capital (or any) offense while serving a term

in prison; but contended and still maintain, that when under a statute, as in Oregon, the one convicted of a capital offense must serve at least twenty days in prison before execution.

Section 1576 of Olson's Oregon laws specifically provides that if a defendant is convicted of two or more crimes "the judgment shall be that the imprisonment must commence at the expiration of the term limited by such previous judgment." That was not done in this instance.

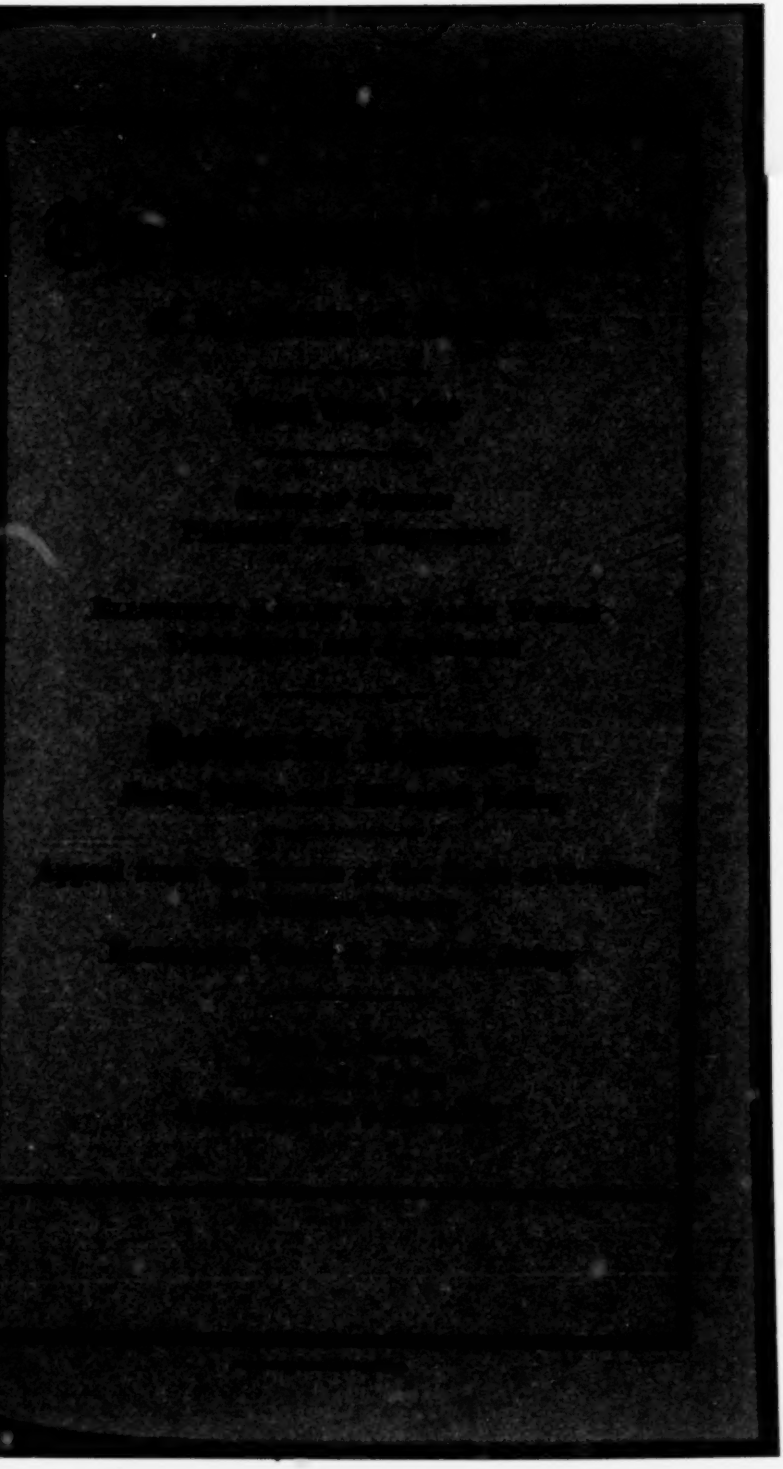
We did not, as implied in the opinion, argue that one convicted while serving a prison sentence cannot be executed under the law; but did and do contend that **when it is provided by statute,** as in this instance, defendant must serve a twenty-day sentence at least before being executed, and that he is entitled to serve the twenty days, whether it be in jail or elsewhere, before such execution may be invoked. And the twenty day incarceration prior to execution must begin, as provided by the statute cited, before the execution may take place. The time for the twenty day period to begin to run must accordingly be at the expiration of the sentence imposed and for which he was serving prior to the commission of the crime and at the time of setence. This can be prevented only by commutation or by acceptance of a pardon, not involved here, by reason of which authorities cited in the opinion on that feature are not in point. None of them, as I take it are under a statute similar, either in wording or effect, to that of the section of the Oregon laws above cited.

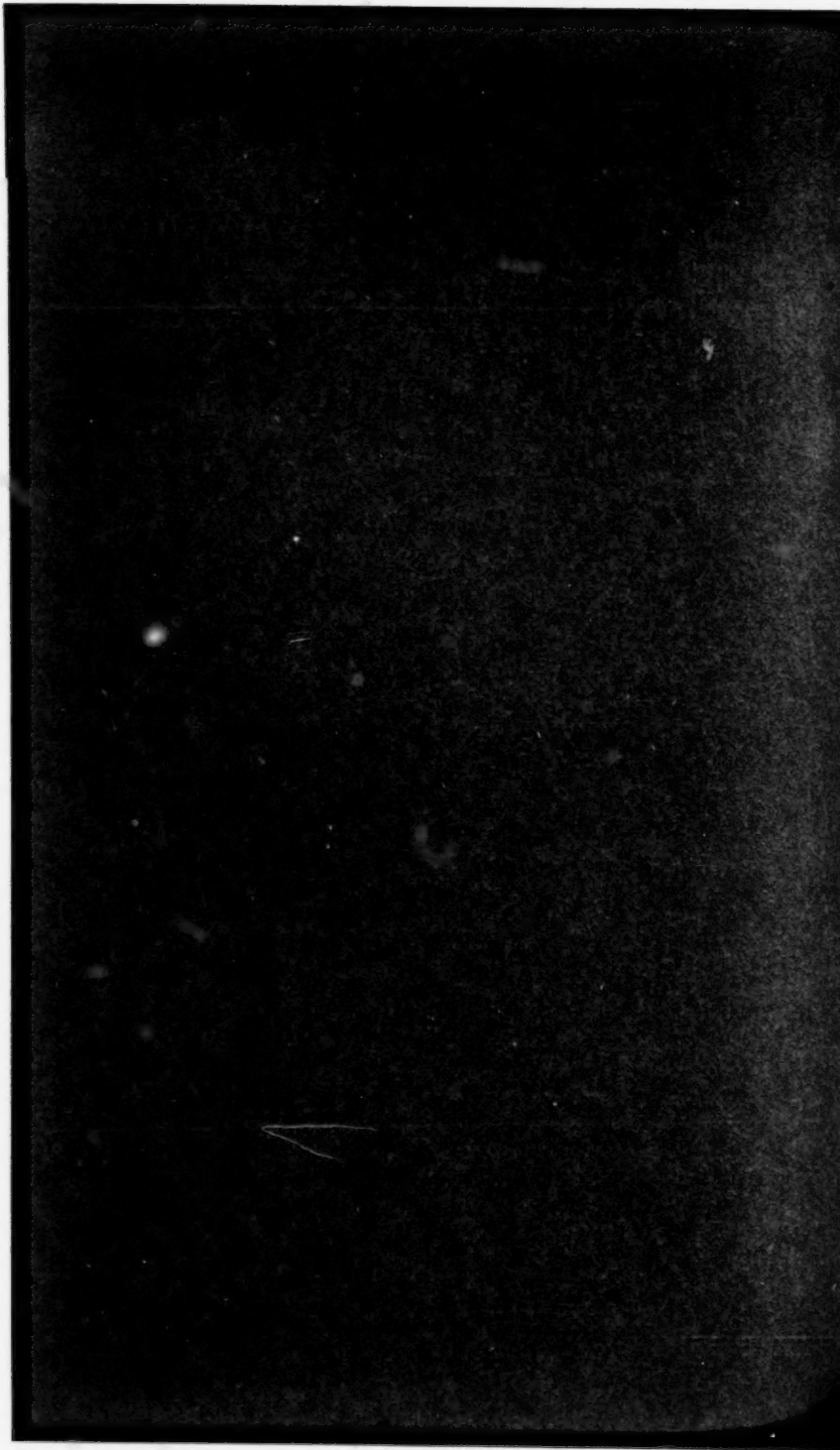
Excerpts are given in the opinion on this point from the opinion of the court below. The third and lengthy paragraph thus quoted seems to imply that we argued that one is exempt from punishment during the term of his former imprisonment, overlooking that this may be done by commutation of the sentence, or by accepted pardon, which does not appear here.

The fallacy of the statement is manifest, so far as license to commit crime, etc., which is highly misleading and unjustified, when it is asked what would be the effect in that regard where capital punishment is abolished as it was in Oregon for several years? Could it be said that conviction for another life sentence would license one to commit crime with immunity? It could at least be said the more the crimes the less the opportunity to secure executive clemency for either. Again: since the opinion appealed from is the one from which this writ of error, or certiorari, as case may be, is taken the opinion cited and quoted can hardly be deemed an authority for its own affirmance.

Feeling that our position not only on the foregoing points, but on other vital points as well, have been very much misunderstood, a rehearing is earnestly requested.

WILL R. KING,
Attorney for Ellsworth Kelley.





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IN

The Supreme Court

of the State of Oregon

March Term, 1926

STATE OF OREGON
Plaintiff and Respondent

vs.

ELLSWORTH KELLEY and JAMES WILLOS
Defendants and Appellants

PETITION FOR REHEARING

Come now the appellants, Ellsworth Kelley and James Willos, and respectfully move the Court for a rehearing in the above entitled cause.

As grounds for the motion the appellants allege that the Court erred in the following particulars:

1. In holding that the Court would not notice or decide whether or not the Court below erred in its instructions defining robbery. The particular instructions are the three set out in full in the brief filed herewith in support of this motion.

2. In holding that because the said instructions were not excepted to by the appellants the Court would decline to notice them.

3. In holding that the rulings of this Court requiring exceptions to instructions, or other errors, were applicable to the instructions here complained of.

4. In not holding that no exception was required to give this Court jurisdiction to hear and determine the question of error assigned, because the error was one that could not be waived by the appellants.

5. In not holding that each of the said instructions was reversible error, and in not reversing the judgment by reason thereof.

6. In admitting in evidence the stenographic report of the questions and answers of Ellsworth Kelley and James Willos, taken at the penitentiary, over the objection of the appellants' counsel that there was no evidence that the said statements were voluntary.

7. In holding that the said statements were voluntarily made, in the absence of a showing to the contrary in the bill of exceptions.

8. In holding that it would be presumed that there was other evidence that the statements were voluntarily made, not appearing in the bill of exceptions.

9. In holding that it was the duty of the ap-

pellants, if there was other such evidence, to have it incorporated in the bill of exceptions, instead of holding that it was the duty of the District Attorney, if there was any such evidence, to see that it was incorporated in the bill of exceptions.

10. In holding that the said statements did not constitute confessions, but only admissions, and in holding that the exculpatory matter in the said statements reduced them from confessions to admissions.

11. In not holding that the facts stated by each of the appellants in their said statements were acts involving and implying the guilt of the appellants of some degree of the crime charged and of an element of such crime.

12. In holding that the admission by both of the appellants that they planned together with Jones and Murray to escape from the penitentiary was not a confession of an element of the offense charged.

13. In holding that the failure of the District Attorney, when the evidence of each appellant was taken at the penitentiary, to inform the appellants of their right to counsel and of their right not to make any statements, and that if one was made by them it could be used against them on the trial, did not make the statements so procured incompetent and inadmissible as evidence against them on the trial.

14. In not holding that the proceeding taken at the penitentiary was extra-judicial and extra-legal and void for every purpose, and the evidence so procured incompetent to be used against the appellants, or either of them.

15. In holding that no statement was taken at the Oregon Penitentiary of the defendant Willos at the same time and place and under the same circumstances as the taking of the statements of defendant Kelley, referred to in the foregoing assignments numbered 6 to 14, inclusive.

16. In holding that the only appearance in the record of any statements by defendant James Willos was when he was called as a witness in his own behalf.

17. In sustaining the trial court's refusal to give the instruction requested in appellants' assignment number 26 (Bill Ex. p. 53; quoted on p. 22 of brief on appeal).

18. In sustaining the trial court's refusal to give the instructions requested in our assignment number 24 on appeal (Bill Ex. p. 51) to the effect that if found that cruel and unusual punishment was being inflicted upon them within a reasonable time prior to the prison escape in which Sweeny was killed, and defendants were living in enforced belief of continuous repetition thereof, and that escape was the only

means of avoiding believed great bodily harm, the jury could take same into consideration in arriving at their verdict, or verdicts, etc.

19. In holding that the only testimony bearing upon questions involved in the last error above assigned (number 18) was limited to that stricken out, given by Tom Murray, mentioned on page 977 of opinion, as our fifteenth assignment of error; and in not considering in connection therewith the testimony given at the trial of both Kelley and Willos, defendants, as disclosed by reference thereto on page 52 of Bill of Exceptions, and as set out on pages 55 to 77 inclusive, in Bill of Exceptions.

20. In application of the usual rules and law applicable to the plea of self defense, where the controversy, or combat, is immediately between individuals to the facts disclosed by the testimony given by defendants, Kelley and Willos, respectively, in which there was presented to the jury for consideration a long series of events disclosing cruel and unusual treatment by which defendants were placed in constant fear of great bodily harm and ultimate death, and in not holding there was error in the court's refusal to instruct the jury relative to the law applicable to the conditions thus presented by the evidence.

21. In not distinguishing between conditions affecting accused where the treatment cruelly invoked upon the person of defendants

incarcerated within prison walls under the enforced restrictions, where the compliance with the law and usual requirement of first retreating to the wall, etc., usually invoked in ordinary and usual homicides, before the killing was, by the confinement within prison walls, made impossible.

22. In holding and recognizing that the defendants were within the jurisdiction of the trial court when tried; and in not holding that under the evidence adduced, as disclosed by the record, defendants, when tried, were within the exclusive jurisdiction of the Warden of the Oregon Penitentiary.

23. In holding that the execution of the sentence imposed could be made effective, prior to the expiration of the terms of imprisonment for which confined as disclosed by the record.

ARGUMENT

The Court has affirmed a sentence of death on the sole ground that the appellants consented to it. The appellants contended at the hearing that the court below instructed the jury that they might find the appellants guilty of murder in the first degree upon facts that do not constitute that crime. The Court declines to notice the contention, or to decide the question. It does so on the ground that the appellants did not except to the instruction. The only purpose of an

exception is to show affirmatively that the accused did not consent to the instruction.

The accused cannot consent to the creation or definition of a crime that is not defined by the Legislature. That body is the only power in the State that can define a crime. The Court cannot do that, with or without the consent of the accused.

8 R. C. L. 58.

State v. Ayers, 49 Or. 61-66.

State v. Vowels, 4 Or. 324.

State v. Gaunt, 13 Or. 115.

State v. Nease, 46 Or. 433.

The failure to except to the ruling of the Court is held to raise a presumption of consent, but no presumption can be indulged that an accused person, on trial upon a plea of not guilty, has consented to be convicted on proof of facts that lack an essential element of the crime.

A waiver of such an error, expressly made, would not be accepted by the Court. That is so, not only because the public has an interest in the life and liberty of every person, but because the statute expressly forbids a sentence of death upon the confession of the accused only.

I hope to make these propositions clear, but before entering upon that discussion I wish to show to the Court, from the record before it, that the lower Court did in fact authorize the jury to

find a verdict of guilty against the appellants of murder in the first degree on facts that do not constitute that crime.

The indictment charges the appellants with killing Sweeney of deliberate and premeditated malice. The Court instructed the jury that if the killing was done with deliberation and premeditation by the appellants they could convict them of murder in the first degree. But the Court also instructed the jury that if the killing was done without premeditation and deliberation, but in the perpetration of a robbery, they could find them guilty of murder in the first degree. So the instructions were alternative, either to convict upon proof of deliberation and premeditation, or to convict without premeditation or deliberation upon finding that the killing was done in the perpetration of a robbery.

Let the instructions show for themselves that this statement is literally correct. The Court instructed the jury as follows:

> "Where the killing, if any, is *not done* in the perpetration of rape, arson, robbery or burglary, in order to constitute murder in the first degree it must appear that such killing was committed purposely and of deliberate and premeditated malice."

And the Court further instructed the jury as follows:

> "The crime charged is murder in the first degree. The statute of the State pre-

scribes that if any person shall purposely and of deliberate and premeditated malice, *or* in the commission or attempt to commit rape, arson, robbery or burglary, kill another, such person shall be deemed guilty of murder in the first degree."

And then the Court instructed as follows:

"In order to constitute murder in the first degree, where the killing is done in the perpetration of a rape, arson, robbery or burglary, *it is not necessary* to prove expressly either a purpose to kill or deliberate and premeditated malice."

The same idea is again repeated in the instructions, as follows:

"*For the purposes of this case*, the material and necessary elements of murder in the first degree are as follows: 1. . . . 2. Either that John Sweeney was killed purposely and of deliberate and premeditated malice, *or* that John Sweeney was killed while the one or ones who did the killing were committing or attempting to commit the crime of robbery."

Since the crime of robbery became an essential element in the crime of murder in the first degree under the instructions, the Court undertook to inform the jury what robbery was. Following are the instructions defining robbery:

"Robbery is the felonious taking of property from the person of another by force. The personal possession of the property by the person robbed may be actual or construc-

> tive. If the property is in his presence or control, though not on his person, it is sufficient."

And then immediately the Court proceeded to tell the jury specifically what was a felonious taking, as follows:

> "If a man knocks another down and takes from him property so in his presence and control, it is robbery. That is the well-established rule of law."

But that is not the well or otherwise established rule of law. An essential element of the crime of robbery is an intent to steal the property. Robbery is an aggravated larceny. The *animus furandi* must exist, and it must exist at the time of the forcible taking or it is not robbery. If, without such larcenous intent at the time, the property was afterwards taken with intent to steal it, it may be larceny or larceny from the person, but it is not robbery. The instruction so far is sufficiently explicit to justify the jury, in following it, to find the appellants were guilty of robbery if they found that they knocked a man down and took property away from him without a larcenous intent to steal the property, and to justify the jury, if they followed the instruction, in convicting the appellants of murder in the first degree if they found that they killed Sweeney in perpetrating this violent trespass. But the Court, *ex industria*, was no

less explicit in the following instruction:

> "When a person takes with force or violence the goods of another, or goods which are under another's rightful custody and control, from the person or presence of the owner or person in the rightful custody and control thereof, and against his will, the person so taking them has committed robbery. It constitutes robbery so far as to render the perpetrator liable to conviction for it."

It will be noticed that these instructions do not purport to designate a violent taking of property as merely one of the elements of robbery. The instruction purports to give *all the elements* constituting robbery. These repeated definitions, so explicitly given, are incurable, short of an instruction just as explicitly withdrawing them. Even a correct definition otherwhere given in the instructions would not cure them, because it would be a case of contradictory instructions, and the Court could not know whether the jury followed the correct or the erroneous instructions. (Authorities below.)

The only other instruction in connection with the definition of robbery that was given was as follows:

> "And if in pursuance of such conspiracy, and in furtherance of a common object, the defendants on trial aided Murray and Jones, and one or more of the conspirators committed the crime of robbery by assaulting the turnkey and knocking him down, and

> by force and violence taking and stealing from his custody and in his presence personal property, if any, in said turnkey's lawful charge and control, namely, guns and ammunition, and while engaged in the commission of such robbery, if any, one of such conspirators shot and killed John Sweeney with a pistol, in Marion County, Oregon, about August 12, 1925, and before August 28, 1925, then defendants on trial, unless they were legally insane at the time, are guilty of murder in the first degree, although neither of the defendants on trial fired the fatal shot which caused the death of John Sweeney."

If we construe the word "steal" occurring in that definition as importing or implying larcenous intent *at the time of the assault,* yet it would be an instruction contradicting the previous definition of robbery, and for that reason would be error. But the instruction itself is not susceptible of a construction that the larcenous intent must accompany the violent taking. The previous explicit definitions of robbery follow the word robbery wherever it subsequently occurs in the instructions. When the jury are told in the last preceding instruction that they may find the defendants guilty of murder in the first degree if one of the conspirators killed Sweeney "while they were all engaged in committing a robbery," the jury must have understood by the word robbery what the Court had previously told them it meant, that is to say, knocking a

man down and taking property away from him without requiring any intent at the time to steal it. The jury must have understood that if the appellants, after the taking, conceived the intent to steal and did steal the property, that that constituted robbery.

A constituent element of robbery is the intent to steal, formed at the time of the taking.

> "In robbery, as in larceny, it is essential that the taking of the goods be *animo furandi,* and unless the taking be with felonious intent it is not robbery."
>
> 28 R. C. L. 1149, Sec. 15.

To that text are cited:

State v. Holloway, 41 Ia. 200; 20 A. R. 586.

Jones v. State, 95 Miss. 121; 21 Ann. Cas. 1137 and Note.

Latimer v. State, 55 Neb. 609; 70 A. S. R. 403.

Hope v. People, 83 N. Y. 418; 38 A. R. 460.

Comm. v. White, 133 Pa. St. 182; 19 A. S. R. 628.

Glenn v. State, 49 Tex. Cr. 349; 13 Ann. Cas. 774.

We also cite the Note to *State v. McCune,* 5 R. I. 60, 70 Am. Dec. 176, 178. Mr. Bishop is quoted to the effect that "robbery is larceny committed by violence from the person of one put in fear." 2 Bishop's Criminal Law, Sec. 1156.

And the same note uses this language:

"Robbery is said to be a compound larceny, composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking."

"The indictment for robbery charges a larceny." 2 Bishop's Criminal Procedure, Sec. 1002.

And the note, on page 188, says:

"The final constituent element of robbery is the *animus furandi.* The taking must be with the intent to appropriate the property likewise as in larceny."

Citing:

People v. Keefer, 2 West Coast Rep. (Cal.) 878.

Long v. State, 12 Ga. 293.

Ward v. Comm., 14 Bush. 233.

Murphy v. People, 3 Hun. 114.

Hammond v. State, 3 Coldw. 129.

And the instructions defining robbery must include the larcenous intent.

Jones v. State, 95 Miss. 121; 21 Ann. Cas. 1137.

In that case the Court instructed the jury:

"If the jury believe from the evidence, beyond a reasonable doubt, that Albert Jones feloniously took the pistol of E. S. Steen, in his presence or from his person and against his will, by violence to his person or by putting Steen in fear of immedi-

> ate injury to his person, as charged in the indictment, then it is the duty of the jury to find the defendant guilty as charged in the indictment."

It will be noticed that in that instruction the word feloniously is used. The Court held the instruction was error for not including specifically the larcenous intent in the taking. This case quotes from *Wood v. State,* 6 So. 207, where a similar instruction was held to be erroneous.

In *Sledge v. State,* 99 Ga. 684, the Court said:

> "The definition of robbery, as expressed in Section 151 of the Penal Code, is inaccurate for want of fullness. It omits the felonious intent as a constituent element of the offense. The *animus furandi* is as much involved in the commission of a robbery as in the commission of a larceny. It is as necessary to be alleged and proven in the one case as in the other. There can be no robbery without an intent to steal; and hence it is legally impossible for the trial judge to give to the jury correct instructions upon the trial of a robbery case, which leave entirely out of view the question of felonious intent. It is not one of those collateral matters concerning which the Court is only required to instruct the jury upon request, but it is of the very substance of the offense, and an omission so to instruct the jury would enable them to convict the accused without finding the felonious intent. This Court has repeatedly ruled that upon that class of questions the trial judge should instruct the jury without request."

Page Eighteen—

In *State v. O'Connor,* 105 Mo. L. C. 126, the Court said, speaking of the instruction:

> "It has all the elements of robbery except the felonious intent, which is omitted. To constitute robbery the property must be taken from the person by force or putting in fear, against the will of the owner, with the intent to deprive the owner of it, and without any honest claim to it on the part of the taker. In other words, the taking must be with intent to steal."

The instruction was held erroneous.

In *State v. McLain,* 159 Mo. L. C. 352, the Court said, speaking of the O'Connor case:

> "In that case, the instruction which was condemned simply told the jury that if the defendant assaulted William Franke, and by force and violence to the person of him, the said Franke, took from the person of him, the said Franke, against his will the watch named in the indictment, etc., they would find him guilty, regardless of the intent with which the offense was committed, and it was held to be erroneous. The only difference between the instruction passed upon in that case, and the instructions complained of in the case at bar, is in the use of the words wilfully, feloniously, and violently in this case, which is claimed by the state to be sufficient. But in order to constitute robbery, the property taken must be with intent to steal, or to deprive the owner thereof, and the words used in the instruction do not necessarily import such a taking. If the announcement of the rule in

these cases is longer to be followed, instruction numbered one, as given in this case, must be condemned for failure to submit an essential element of the offense to the jury. This is simply the recognition of an old and well settled principle in criminal law, and there is no good reason suggested why it should be departed from, and we are unwilling to do so."

Whatever the statutory definition may be in other states, the intent to steal is made by our statute an element of the offense. Robbery by putting in fear, not being armed with a dangerous weapon, is defined as follows:

> "If any person, not being armed with a dangerous weapon, shall, by force and violence, or by assault, or by putting in fear of force and violence or assault, rob, steal or take from the person of another any money or other property which may be the subject of larceny, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than three nor more than fifteen years."

And robbery, being armed with a dangerous weapon, is defined as follows:

> "If any person, being armed with a dangerous weapon, shall assault another with intent, if resisted, to kill or wound the person assaulted, and shall rob, steal or take from the person assaulted any money or other property which may be the subject of larceny, such person, upon conviction thereof, shall be punished by imprisonment in

> the penitentiary for a period of not less than ten years, or during the natural life of such person so convicted. . . ."

Larceny by stealing from the person is defined as follows:

> "If any person shall commit the crime of larceny by stealing from the person of another, such person shall, upon conviction thereof, be punished by imprisonment, etc."

In the case of *State v. Lawrence,* 20 Or. 236, the indictment charged, in effect, the defendant with assaulting one Leabo, and putting him in fear and taking from him, forcibly, a silver watch of the value of $10. The Court held this indictment was not good. The Court said:

> "The defendant may have used force and violence, or assaulted the prosecutor, or put him in fear of force and violence or assault, yet if he did not rob, steal or take from the person the property in question by some one or more of the means enumerated, the crime is not made out."

In *State v. Parr,* 54 Or. 316, it is said that robbery is "larceny aggravated by the circumstance that the property asportated was taken from the person of another by violence or putting him in fear."

To justify the verdict, the jury must find a larcenous intent at the time of the taking. But the instructions relieve them of that necessity.

> "A guilty intention may be inferred from the act, but this in principle is an inference of fact to be drawn by the jury and not an implication of law to be applied by the court."
>
> 8 R. C. L. p. 61, note 13.

It was error, therefore, to take the question away from the jury.

If the Court should be of the opinion that the last instruction on robbery implies that the larcenous intent existed at the time of the taking, it is contradictory to the previous definitions of robbery. Contradictory instructions constitute error.

> *State v. Miller,* 43 Or. 325; 74 Pac. 658.
> *State v. Howard,* 41 Or. 49; 69 Pac. 50.
> *State v. Hill,* 63 Or. 451; 128 Pac. 441.
> *Mills v. U. S.,* 164 U. S. 644, 649; 17 S. C. Rep. 210, 41 L. Ed. 584.

The rule here relied on is a specific illustration of the more general proposition that the total failure to prove any essential element of the crime charged is fatal to conviction, and an instruction which authorizes a conviction upon facts omitting an essential element of the crime is fatally bad.

In the case of *State v. Carver,* 22 Or. 602, the defendant was convicted of murder in the first degree. The Court below instructed as follows:

> "An intent to murder is conclusively pre-

> sumed from the deliberate use of a deadly weapon causing death within a year. Hence, if you find from the evidence, beyond a reasonable doubt, that the defendant purposely and maliciously killed deceased by the deliberate use of a deadly weapon causing death within a year, then your verdict should be guilty."

The Court held this instruction manifestly erroneous. It said:

> "It authorized and directed the conviction of the defendant of murder in the first degree upon proof only of murder in the second degree. The instruction entirely omits all the necessary requisites and distinguishing features of murder in the first degree, and substitutes therefor the presumption arising from the deliberate use of a deadly weapon. It correctly defines murder in the second degree only, and yet the jury must have understood that if the case as stated in the instructions was shown by the evidence, they must find the defendant guilty as charged."

In the case of *State v. Scott,* 63 Or. 444, the charge was extortion. The Court upheld the sufficiency of the indictment, which charged that the threatening letter was communicated to Mr. Gallagher. The letter was sufficiently proved to have been written by the defendant. The Court there distinguishes between the indictment and the proof. The Court below gave the following instruction:

> "However, upon the other hand, if you are satisfied beyond a reasonable doubt, after having considered all the evidence submitted in this case, that the defendant wrote the instrument of writing which is in evidence here and set forth in the indictment, or the communication was delivered to Mr. Gallagher, it would be equally your duty to find the defendant guilty of the crime charged."

The Court held the instruction to be error and that both the "authorship and promulgation of the offending document must be brought home to the defendant," and that it was possible to convict the defendant of the delivery of the communication by someone else without the authority of the defendant. That was a case where the jury were authorized to find the defendant guilty of facts that do not constitute the crime.

In the case of *State v. Wong Si Sam*, 63 Or. 266, the question arose under Section 1540 L. O. L. to the effect that a conviction cannot be had upon the uncorroborated evidence of an accomplice, but there must be evidence tending to show his connection with the commission of the crime. The Court below read that definition from the statute, but proceeded at length to instruct the jury to the effect, as held by the Court, that he might be convicted without other evidence than the accomplice tending to show his connection with the crime. The Court said the reading of the statute was qualified by the other instruc-

tions. It was a case where essential proof was lacking.

In the case of *State v. Hill,* 63 Or. 451, the question was as to an instruction requested, as follows:

> "Before you can convict this defendant you must believe beyond a reasonable doubt that he is guilty of or in complicity with the original taking, and any subsequent connection after the taking would not be larceny, no matter whether in good or bad faith, and if you believe that this defendant received the horses in question from Walter Hill, or any other party, after the felonious taking, whether in good or bad faith, he is not guilty of larceny, and you must acquit him."

The Court said it was error to refuse that instruction. It is also a case where the instruction given by the Court submitted to the jury to find the defendant guilty of larceny without a larcenous intent at the time of the taking. The case is in point on the general proposition now under discussion, and also strongly in point on the necessity of including in the instruction a larcenous intent at the time of the taking.

The Court refuses to pass upon the question here presented because the defendants did not take an exception to the instructions complained of. Now, the cases are in accord that the total failure to prove an essential element of a crime is fatal to a conviction, and no more needs an

exception than a bad indictment. This is so, first, because the public has an interest in the life and liberty of the accused which he cannot be deprived of except upon proof of facts constituting a crime.

State v. Godager, 56 Or. 205; 108 Pac. 185.
Hopt v. Utah, 110 U. S. 574 (4 S. C. R. 202, 28 L. Ed. 262).
Crane v. United States, 162 U. S. 625 (16 S. C. R. 952; 40 L. Ed. 1099).
State v. Walton, 50 Or. 142 (13 L. R. A. N. S. 817; 91 Pac. 490).

In the Walton case the case of *Hopt v. Utah* is cited with approval by this Court. The language in *Hopt v. Utah* is as follows:

> "The public has an interest in his life and liberty and neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life and liberty cannot be dispensed with or affected by the *consent of the accused*, much less by his mere failure, when on trial and in custody, to *object to unauthorized methods.*"

And in the second Walton case, *State v. Walton*, 51 Or. 574, 576; 91 Pac. 495, this Court emphasized the rule as follows:

> "Even had defendant intended to waive his rights in this respect, it must be remembered that this is a matter in which the pub-

> lic has an interest which cannot be left entirely to the wishes of the person on trial. Otherwise a defendant might enter into a binding contract with the state, through the district attorney, to go to the penitentiary for a certain number of years, in satisfaction of an offense. But it is too well settled to need citation of authorities that the public has such an interest in procuring a trial of the citizens of the state according to law as to preclude such proceedings."

And then the Court cites with approval the following extract from *Hill v. People,* 16 Mich. 351:

> "Let it once be settled that a defendant may thus waive this constitutional right, and no one can foresee the extent of the evils which might follow. But the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act of neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger *in limine,* and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases emphatically that consent should not be allowed to give jurisdiction."

And Mr. Justice Harlan, in *Crane v. United States,* 162 U. S. 645; 16 S. C. R. 952, uses this language:

> "The present defendant may be guilty and may deserve the full sentence imposed upon him by the trial court; but it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that he had a valid trial."

That the defendant does not waive by not objecting thereto the necessity of showing facts constituting a crime, is determined by the statute. He does not waive that necessity even by pleading guilty to an indictment failing to state facts sufficient to constitute the crime. Section 1560, O. L. allows a motion in arrest of judgment on a plea or verdict of guilty, and such motion may be founded upon the objection that the indictment does not state facts sufficient to constitute a crime.

There is another reason why the Court cannot ignore the error here complained of. The requirement of an exception is a judicial and not a statutory rule. A rule or ruling of the Court in conflict with the statute is void. The statute of this State forbids a trial court to sentence an accused to death upon his consent only. Section 1907, O. L., provides:

> "If, upon an indictment for murder, the

> defendant be convicted upon his own confession in open court, the court shall hear the proof and determine upon the degree of murder, and give judgment accordingly."

A confession in open court, which is the same as a plea of guilty, is a consent to the truth of the charge of murder in any degree. Yet upon such a solemn consent in open court, the Court cannot sentence the defendant to murder in the first degree, but must hear the proof and determine the degree of murder. Now, the Court has decided in effect that, not taking an exception to the instruction, he has consented thereto, and, as we have shown above, the instruction permits the jury to find the defendant guilty of murder in the first degree upon facts that do not constitute that crime.

Now, it is everywhere held that a rule of the Court in conflict with a law is void.

7 R. C. L. p. 1024.
State v. Posey, 17 La. Ann. 252; 87 A. D. 525.
Van Ingen v. Berger, 82 O. St. 255.
Suckley's Admr. v. Rockford, 12 Grat. (Va.) 60.
Goodwin v. Bickford, 20 Okla. 91; 129 A. S. R. 729.
Note: 41 A. S. R. 642.
People v. Met. Surety Co., 164 Cal. 174; 128 Pac. 324.
Ann. Cas. 1914-B, 1181 and Note.
Mills v. United States Bank, 11 Wheat.

431, 438 (6 L. Ed. 512).
Doe v. Winn, 5 Pet. 233, 242.
Schitzner v. Stein, 96 Or. 343.
Pittock's Will, 102 Or. 159.

As stated in Doe Re Patterson, 5 Pet. 243:

> "However convenient the rule might be to regulate the general practice of the courts, we think that it could not control the rights of the parties in matters of evidence admissible by the general rules of law."

That the presumption of consent is the basis of the judicial rule requiring an exception is demonstrated in the case of *State v. Laundy*, 103 Or. 443. This Court, speaking through Judge Harris, has given the clearest exposition of the function of an exception and of the rationale of the rule that can be found anywhere. We quote:

> "Before noticing the record, let us first consider the subject of exceptions. What is an exception? What is its office and function? Is it nothing more than an arbitrarily prescribed ceremonial amounting to a meaningless mummery; or, is it, like most rules of procedure, a rule based, not upon purely arbitrary grounds, but upon substantial reasons and hence designed to accomplish in a logical and understandable way a definite purpose? In the language of the Code, 'an exception is an objection taken at the trial to a decision upon matter of law': Sec. 169, O. L. An exception is a pro-

test against a ruling of the court. It is notice *to the court and opposing counsel that* the objector does not acquiesce in the ruling. When, for example, in the course of a trial an objection is made to a question asked a witness, and the court rules on the objection, the objector may or he may not be satisfied with the ruling. If the objector is satisfied with the ruling, the court and the opposing attorney are entitled to know it; and so, too, they are entitled to know it if the objector is not satisfied. If the objector is silent after the court announces its ruling, the presumption is that the objector, after hearing the ruling and the reasons for it, acknowledges the correctness of the ruling and *acquiesces in it;* and, consequently, *in order to prevent the presumption of acquiescence the objector must ordinarily express his nonacquiescence.*"

Citing:

Sec. 169, O. L.
Hayes v. Clifford, 42 Or. 568.
Fornof v. Wilkinsburg, 238 Pa. St. 614.
3 C. J. 894.
8 Ency. Pl. & Pr. 157.
2 R. C. L. 92.

The Court said further:

"In addition to serving as notice of nonacquiescence, an exception, in many jurisdictions, performs another function, although it is possible that this other function is not now so important in this jurisdiction as it was before the amendment of certain sections of the Code regulating appeals."

Then the Court cites Sec. 171, O. L., which provides that "the bill of exceptions may consist of a transcript of the whole testimony and all of the proceedings had at the trial."

The other function performed by the exception, referred to, is that the ruling may be a part of the record. But what transpired at the trial may be made a part of the record although it is matter not excepted to. The instructions in this case are made a part of the record. Now, since the ruling here, which is the instructions, is of such nature that the defendants cannot be held to acquiesce in it, because the State has an interest in their life and liberty, and because of Section 1907, supra, then an exception, if taken, would perform no function. It would, in the language of the Court in the Laundy case, be only "an arbitrarily prescribed ceremonial amounting to a meaningless mummery."

The instructions being a part of the record, Section 172, O. L., applies, which is:

> "No exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the Court."

And in the Laundy case the Court holds as follows, quoting Sec. 1625, O. L.:

> "The Court can review only 'questions of law appearing upon the transcript'. This is

> the only statutory declaration upon the subject; it is the only prohibition imposed by the statute; and if there be any additional prohibitions or restrictions they are only such as are prescribed by judicial decisions. In this jurisdiction, as in most jurisdictions, the general rule established by Court decisions is that only such questions of law as are presented upon an objection, an adverse ruling, and an exception will be reviewed upon an appeal; but this rule, like many rules, has its exceptions. One exception to this general rule, expressly recognized by the Code, is found where the question of law is one that is involved in a ruling which properly appears in the judgment roll even though there be no bill of exceptions."

The instructions here complained of are a part of the transcript in this Court. They are certified by the judge below to have been given at the end of the trial. They are filed in the lower Court, and upon a suggestion of a diminution of the record, and an order of the Court, the clerk has certified the instructions here. The judge of the lower Court certified that these instructions were substantially those given at the end of the trial. Section 172, Oregon Laws, provides that they shall be taken as a part of the record. He interpolated into his certificate that he gave some instructions during the course of the trial. But the instructions given at the end of the trial became the law of the case to the jury. It is the last word of the Court to

the jury about the law. In Section 132, Subd. 6, 1 O. L., it is provided that after the argument "the Court may then charge the jury." And in Section 139, 1 O. L., it is provided that "in charging the jury the Court shall state to them all matters of law which it thinks necessary for their information in giving their verdict." Now, the instructions given from time to time upon matters of evidence arising during the trial are not the charge mentioned in the statute. That charge consists of all the law of the case which the Court deems necessary to inform them. The Court therefore must look to this charge as finally given to determine whether error has been committed. It cannot be presumed that the charge required by the statute to be given at the end of the trial can be scattered throughout the trial. No presumption can possibly arise that any previous direction to the jury in the course of the trial has in any wise qualified or improved or cured the instructions given in the charge. If there is a single case anywhere that decides that the final charge does not contain all the instructions of the Court, we have not found it. The interpolation, so far as I know, is the first of the kind on record. This is important because the Court has indulged the presumption that other instructions were given in respect of some other errors relied on. In any event, what those instructions during the trial

were, does not appear from the Bill of Exceptions. If there were any pertinent to the error, it was incumbent on the district attorney to see to it that they were incorporated in the Bill of Exceptions. See authorities infra.

It appears that the instructions here given are a literal transcript of the instructions given in the case of *State v. Brown,* 7 Or. 186. But in that case the robbery was admitted, as the Court said, and the question before the Court was not as to the correct definition of the robbery, but whether or not the killing was done after the robbery was completed. Neither counsel nor Court considered the question of the definition. It is not a precedent to support the instruction here, and if it were, it ought to be overruled, for it is contrary to the well settled rule.

Section 554, O. L., provides that the appellant "shall file with the clerk of the Appellate Court a transcript . . . of so much of the record as may be necessary to intelligibly present the question to be decided by the appellate tribunal." The appellants here have caused to be filed a certified copy of all the charge delivered to the jury at the end of the trial, and on file in the lower Court. They have done everything the law requires them to do to invoke a decision upon the question here presented.

We present to the Court some of the authorities to the effect that the appellate Court will,

without objection or exception, reverse a case for the total lack of evidence of some element of the crime charged. Now, what is the difference between such failure of proof and an instruction to the jury that the necessary element need not be proved? In either case the verdict is founded upon facts that do not constitute the crime, for the Court must presume that the jury followed these instructions, and that the vice inheres in the verdict.

Moore v. United States, 224 Fed. (C.C.A.) 95, 97.

Wyborg v. United States, 163 U. S. 632, 658 (16 S. C. Rep. 1197; 41 L. Ed. 289).

Sykes v. United States, 204 Fed. 909, 123 C. C. A. 205, 210.

~~*Isbell v. United States,* 227 U. S. 788.~~

~~*Means*~~ Reems *v. United States,* 217 U. S. 349, 362 (30 S. C. R. 544; 54 L. R. A. 793).

Of course, our contention is that the exception was not necessary to raise the question, and that counsel for appellants was not in any wise derelict in failing to take an exception. But sometimes it is said that in justice to the Court below, as if the Court were on trial, the attendtion of the Court ought to be called to a fault in the instructions. If that be so, yet it is a fault that does not carry with it the serious consequences in this case. A failure to take an exception to an instruction is not murder in the

first degree. The appellants should not be

> "Without reprieve, adjudged to death
> For want of well pronouncing Shiboleth."
>
> —*Milton.*

This Court, it is justly said, has only appellate jurisdiction. But its appellate jurisdiction is plenary. It is conferred by the Constitution, and it is to revise the final orders of the Circuit Courts. The Court can no more restrict its appellate jurisdiction by its rulings than it can exceed it. Therefore, when appellants present to this Court a question plainly appearing in the record, which they have not waived, because they cannot waive, and which, if well taken, must result in a reversal of the judgment, the Court is without any power to refuse to hear it. The right of appeal is given them by law, and the Court cannot take it away from them. The appeal is a part of the due process of law which the Constitution and the law, in pursuance thereof, has guaranteed to them. It is their lawful remedy. The Court's ruling that it will not decide this question is therefore in contravention of the Constitution of the State, which provides that every man shall have remedy by due process of law for injury done him in person, property or reputation, and of the Fourteenth Amendment to the Constitution of the United States, which prohibits any State from depriving any person of his life or liberty without due process of law,

or to deny him the equal protection of the law.

In any criminal trial, and particularly where it is a question of life and death, the trial Court and the accused are not adversaries. The Court is no man's adversary. Its first care is to see that the accused has a fair trial, and that means a legal trial. Its duty in that respect is not qualified in a matter involving the substance of the crime by any omission of the defendant. The responsibility of the Court cannot be shifted to the defendant's shoulders. If the inadvertence was the defendant's, it was the Court's, in the first place. The appellants should not suffer because they were not alert to instruct the Court in the discharge of its paramount and undelegable duty.

There was fatal error. It is only the majesty of the law that can pronounce the legal doom of death. And where the law has not pronounced it, it cannot be decreed by the breath of any man.

Error in Admitting the Statements of the Appellants Taken at the Penitentiary

The following from the Bill of Exceptions states in full what occurred when the evidence was offered and admitted:

> "Blanche F. Barrett, being called as a witness on behalf of the State of Oregon, and duly sworn, was interrogated by John H. Carson, District Attorney, and in said interrogation, gave the following answers

to the following questions, to-wit:

Q. You are the duly appointed, qualified and acting court reporter of this district?

A. Yes, sir.

Q. At our request, on or about the 25th day of August, 1925, did you attend at the Oregon State penitentiary for the purpose of taking stenographically the statements of these defendants, Ellsworth Kelly and James Willos, together with a statement of the defendant Tom Murray?

A. Yes.

Q. Do you recall at that time and place, being the parole office of the Oregon State penitentiary, Salem, Oregon, having seen the defendant Ellsworth Kelley?

A. Yes, sir.

Q. Did you hear a conversation between Ellsworth Kelley and myself and others?

A. I did.

Q. Did you report stenographically these conversations?

A. I did.

Q. State whether or not the transcript you made is a correct transcript of your notes taken at the time of the conversation.

A. It is.

"Whereupon the defendants, through their counsel, Will R. King, objected as incompetent, and for the further reason it is not disclosed the statement was made with-

out duress, or without offer of reward, or that they were made voluntarily, and that if the witness has any knowledge independent of her notes she must state orally what was said.

Q. (Mr. Carson) Do you recall the conversation had between ourselves and Ellsworth Kelley?

A. Not independent of my notes, Mr. Carson.

Q. By referring to your notes could you correctly restate the conversation as it was had?

A. I could.

Q. Then will you please get your notes, with the consent of the Court?

"Whereupon, the witness, returning to the Court room with the shorthand notes above referred to, the jury was dismissed from the Court room and the witness read from her shorthand notes the above referred to statement of the defendant Kelley, and also the statement of the defendant Willos, after being interrogated by the district attorney along the same line as to defendant Willos as previously set forth as to defendant Kelley, which statements are as follows:"

(Here follows the statement by questions and answers of the defendant Kelley.)

We call particular attention to the last foregoing statement of the Bill of Exceptions, be-

cause the Court has a misapprehension about that. Assignment 13 recites:

> "It is further assigned as error that James Willos was called as a witness without first having been informed that it was unnecessary for him to give testimony regarding himself, all of which was in violation of Article XIV amendment to the Constitution, etc."

This assignment is clearly intended to raise the question of the introduction of the statement of James Willos taken at the penitentiary, and was not intended to assign as error that he was not informed of his right not to give testimony when he was called as a witness by his counsel. That would be an absurd construction. Surely counsel cannot be supposed to have called his own client as a witness, and then object to a failure of the district attorney to tell him that he did not have to give testimony. So the statement in the bill of exceptions above recited, that the same objections were made to the statement of Willos as had been previously made to the statement of Kelley, shows clearly that Assignment 13 was intended to raise the same question.

Then the Bill of Exceptions, page 39, continues:

> "Whereupon, at the close of the above testimony, Will R. King, counsel for defendants, further objected on the ground that the parties questioning defendants were

State's attorneys, and did not inform or apprise defendants, or either of them, of that fact, and defendants were not apprised of their constitutional rights of counsel, which further objection was overruled by the Court, who said: 'It is very clear to my mind that this testimony is only applicable to the defendant whose statement was being made. In other words, the alleged statement made by the defendant Kelley would not be binding against the defendant Willos, and the alleged statement made by Willos would not be binding against Kelley, and only so far as it tends to show the connection of the defendant speaking to the alleged offense would it be heard, and I will so instruct the jury at this time.' Which instruction was duly given.

"The above ruling the Court in allowing the statements above set forth to be repeated by said witness in the presence of the jury was excepted to by counsel for defendants, Will R. King, which exception was allowed by the Court, and the statements were thereupon repeated by the witness, this time in the presence of the jury."

Before evidence of confessions or admissions involving guilt, made to officers, can be admitted, it is incumbent upon the State in the first instance to prove to the satisfaction of the trial Court that the statements were voluntarily made.

State v. Sharos, 56 Or. 119, 120.
State v. Humphreys, 63 Or. 540, 553.

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State v. Garrison, 59 Or. 440.
State v. Rogoway, 45 Or. 601,. 606.
State v. Blodgett, 50 Or. 329.
State v. Morris, 83 Or. 429.
State v. Howard, 102 Or. 431.

In respect to this ruling upon this record, this Court said:

> "A careful reading of the subject matter involved discloses no confession of guilt on the part of the defendants. On the contrary, they denied any participation in the killing of Sweeney or any attempt to kill him."

Then the Court said:

> "Granting for the moment that the statements reported by the stenographer were indeed confessions or distinct admissions of guilt, the admissibility of any inculpatory statements of defendants is a question of law in the first instance for the Court, and in the absence of any showing on that subject in the bill, we must presume that the Court did its duty and required such a showing to be made. There is no challenge in the bill to the sufficiency of any showing."

The Court is wrong in both of these rulings. Of these questions in their order.

It seems to be the opinion of the Court, because, as the Court finds from the reading, the appellants denied any participation in the killing of Sweeney, or any attempt to kill him, that that fact alone reduces the statements from confessions to admissions. The contrary has been

established by this Court. *State v. Porter*, 32 Or. 135. The question is not whether the appellants made exculpatory statements accompanying their statements, but whether or not the statements that they admitted to be true involved the commission of some degree of the crime charged. Before examining these statements in that respect, we will examine the Porter case. The gist of the opinion is stated in the first syllabus, and is as follows:

> "Statements or declarations of the accused, voluntarily made, of such facts as necessarily involve the commission of a crime, or in themselves constitute a crime, are admissions of guilt, and may be properly denominated confessions; nor will they be reduced to the grade of admissions only by exculpatory statements made in the same connection. *State v. Heidenreich*, 29 Or. 381, distinguished."

The exact distinction between confessions and admissions was the exact point in that case. The Court below, in instructing the jury, had referred to certain statements of the defendant in evidence as confessions and admissions. It was contended by the defendant that this was error, because it was inapplicable and misleading to call the statements confessions. The case of *State v. Heidenreich*, 29 Or. 381, had held that an instruction was error that described statements of the defendant as confessions when they

were only admissions. It became necessary, therefore, for the Court in the Porter case to determine whether or not the statements involved in that case were confessions or only admissions. Many authorities are cited. 1 Greenleaf on Evidence, Sec. 170, describes confessions as admissions from which guilt might be implied. Wharton on Criminal Evidence, Sec. 626, 628, is quoted at length, in which the distinction is made between confessions and admissions. This language is used: "An admission of an incidental fact is of no weight unless it affords a basis for an induction of guilt."

Then this Court says, in the Porter case:

> "From these authorities we take it that the admission of a fact, or a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. Of the latter character were the admissions in the Heidenreich case."

And the admissions in the latter case were held to be entirely consistent with the innocence of the defendant. The Court continued:

> "His guilt was not deducible from his admissions without the presence of other facts and circumstances necessary to be

proven in connection with his possession to establish the crime charged."

The Court then, citing the cases where error was committed by calling admissions confessions, stated that in each of those cases the facts admitted may have been taken as entirely true and still be consistent with defendant's innocence. It is said that they were "fragmentary, and, unless complemented by other proofs necessary to the establishment of the offense, guilt could not be predicated upon the admissions."

On page 149 the Court resumes:

"The reasoning of counsel seems to be that, because of the exculpatory matter, there can be no concession of guilt, and hence that the statements or admissions cannot amount to a confession. But the concessions of facts which import guilt come first. These are always inculpatory, and it is only when the exculpatory matter is adduced that he is relieved from the onus of guilt which the facts imply. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts admitted involve a crime, and these import guilt, or, as put by Mr. Wharton, 'I am guilty of this;' and this imports the admission of all the acts constituting guilt."

And further, on page 150:

"So that we conclude that whenever the statements or declarations of the accused, voluntarily made, are of such facts as in-

> volve necessarily the commission of a crime, or in themselves constitute a crime, then the facts admitted import guilt, and such admissions may properly be denominated confessions. Exculpatory statements, made in the same connection, if believed, may excuse or justify, but do not reduce the declaration from a confession to an admission only."

It is said also, on page 149:

> "The instructions, however, were given with reference to admissions before the trial, and it is in that light that we design to consider them, and it is sufficient that the admissions involve any degree of the crime charged. . . . and a confession of either degree, with proof of the *corpus delicti,* would be sufficient upon which to base a verdict of the crime involved."

That case was cited in *State v. Caseday,* 58 Or. 450. The opinion was by Mr. Justice Burnett. The defendant complained of the following instruction:

> "The testimony of some witnesses has been offered by the State to show certain oral statements made by the defendant now on trial, after the death of Oliver Snyder. In criminal law a statement voluntarily made by a person of a fact only, which is as consistent with his innocence as with his guilt, and is made exculpatory, or in explanation of any suspicious or incriminating circumstances, is an admission; but when the statement carries with it a *suggestion of guilt,* either as to the character of his intent, or

> the quality of his act, and the statement is made inculpatory, such statement is in the nature of a confession."

The Court in that case approved that instruction, citing the Heidenreich and Porter cases. The instruction is in accord with the Porter case in that when the statement carries with it a suggestion of guilt, it is a confession.

Now, in the light of these cases, we will examine the statements, and certain instructions of the Court.

Kelley said that he and Willos cut the hole in the roof through which the escape was made. He was asked this question:

> Q. When did you tell Jones and Murray you had cut the hole?
>
> A. Well, they already knew, they knew we was going to cut it.
>
> Q. How long had you been discussing the break?
>
> A. Well, we had been discussing part of it—for a considerable time. We didn't figure on the shooting end of it.
>
> Q. Well, except for the shooting, did you figure it out just as you did it?
>
> A. Except for the shooting. We figured we was going out the front gate, that was our intention, to go out the front gate.

It appears all through these statements of both appellants that all four men were

engaged in an attempt to escape from the penitentiary where they were convicts. On page 24 Kelley was asked:

Q. How long had you figured on making the break through the roof?

A. Well, we discussed it off and on several months but we hadn't decided on the exact method of doing it.

Q. Had you decided—how long prior to the time you got the hole made, on that particular day?

A. Yes, whenever—we had agreed to do it on commissary day, when the fellows were taking groceries up and back and forth.

Willos' statement follows in this respect:

Q. Willos, will you give us your version of this escape that you were in with Murray and Jones and Kelley?

A. All right; whereabouts do you want me to start in.

Q. From the time you planned it.

A. From the time we planned it?

Q. Yes.

A. The first time we ever got to talking about it, we were sitting behind the woodpile one day, and we got to talking about liberty, and we would all like to get out, you know, and Murray he made the suggestion about going out through the roof, and through the front gate, and it sounded all right to me, and they never at that time said anything about killing anybody, nothing like that, but I'd been here

for a long time you know, seven years, and I had no understanding with them they would do anything like that, anything like that was going to take place, I thought it was all right, and so I just went with them, and never thought no more about it.

Q. Who was it cut the hole?

A. Why, Kelley and I cut the hole.

Q. Was that the understanding?

A. Well, they thought it wouldn't be noticeable.

Q. They figured, Jones and Murray figured you and Kelley wouldn't be noticed as much as Jones and Murray, your absence?

A. Yes, so we cut it.

Q. When did you cut it?

A. Some time in the afternoon.

Q. On the day of the escape?

A. Yes.

So the statements of both appellants admit the existence between all four of a conspiracy to escape from the penitentiary. An attempt to escape from the penitentiary is a felony. Sec. 2035-1 O. L. Now, it was necessary, in order to convict these defendants of murder in either degree, to prove a conspiracy to escape from the penitentiary, if one of the other conspirators and not themselves killed Sweeney, and the Court so instructed the jury. On page 7 of the

instructions the Court instructed the jury that it was necessary to show "that the defendants Ellsworth Kelley and James Willos committed the crime by acting in pursuance of a conspiracy in concert with, or by aiding, abetting and assisting the person who shot and killed John Sweeney, if said John Sweeney was shot and killed."

And on page 13 of the instructions, the Court instructed:

> "I instruct you that a conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself unlawful or criminal, by criminal or unlawful means. When individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one of the conspirators is in legal contemplation the act of all. And this mutual, coequal responsibility of each conspirator for the acts of his associates done pursuant to and in furtherance of the common design extends to such results as are the natural or probable consequences of such acts, even though such consequences were not specifically intended as part of the original plan."

The Court further instructed the jury:

> "The State contends that the defendants on trial entered into a conspiracy with defendant Tom Murray, and one Bert Oregon Jones to escape and aid each other in escap-

> ing from the Oregon State Penitentiary, and pursuant to and in furtherance of such alleged conspiracy the crime alleged in the indictment was committed. This is one of the issues in this case."

The Court further instructed the jury, page 14:

> "All who take part in a conspiracy while it is being formed and all who with knowledge of the facts concur in the plans originally formed and aid in executing them are fellow conspirators. They commit the offense when they become parties to the transaction or further the original plan with knowledge of the conspiracy."

Then on page 15 the Court at length instructed the jury that if any one of the conspirators shot and killed Sweeney, "then the defendants on trial, unless they were legally insane at the time, are guilty of murder in the first degree, although neither of the defendants on trial fired the fatal shot which caused the death of John Sweeney."

So that the admissions of both appellants that they were in a conspiracy to escape from the penitentiary involves the guilt not only of that crime, but the crime of murder in the first or second degree, committed in attempting to escape. Under the definition of the Porter case, this was an admission of an essential fact to be proved by the State under the indictment, even

though the defendants did not themselves kill Sweeney.

But the statements of the appellant went further than an admission merely that they were engaged in an attempt to escape. They both stated facts from which the jury could find that it was a part of the conspiracy to use guns in attempting to escape. Kelley's statement, page 18:

> "Q. Well, you decided in discussing, planning it, to make for the arsenal, didn't you?
>
> A. Well, someone discussed that. They thought that would just take care of itself; if they had to take a chance to take a couple of men in the office and make them go ahead out the front gate; otherwise try to get in the arsenal. None of us knew for sure whether there were any loaded guns in the arsenal; it was kind of speculation on our part.
>
> Q. But you all must have figured there was at least one gun or more in the arsenal?
>
> A. Well, the only thing we might have figured on was a pistol being on the desk, which wasn't there, and that is the only thing we actually figured on, was the pistol, which wasn't there.

On page 24, Kelley's testimony:

> Q. You thought there was a gun in the turnkey's office on the desk?

A. They thought there was one in the turnkey's office on the desk, yes.

Q. Is that why Murray and Jones went immediately to the turnkey's office when they got down?

A. That is why Jones went to the desk. He went to the desk, but they were figuring on making the turnkey go ahead and go out the front gate. They thought it was a long-shot, they didn't know whether it would work or not, but that is the way we had it *figured in the first place.*

Q. You must have figured it was necessary to get a gun to do that?

A. That was all just kind of speculation about the gun proposition, Jones he wanted to get the guns, and I had been arguing against it myself from the start. I knew we couldn't get away with a thing like that.

Q. They finally then overruled your objection?

A. Yes.

Q. And decided to get the guns anyway?

A. Yes, sir.

Willos did not make any specific admission that he intended in the original plan to get guns or to do any shooting, but when they were down in the prison yard he stated that the shooting commenced, and that a gun was tossed to him by Murray, and that he picked the gun up and

shot three times in the direction of the garage, but that he did not see anybody.

From that evidence the jury could infer a previous intention, as a part of the conspiracy, to use guns.

Besides all that, the Court correctly instructed the jury, as stated above, that a conspirator is responsible for the natural or probable consequences of the acts of his co-conspirators, even though such consequences were not specifically intended as part of the original plan.

In addition to that, both of the appellants stated to seeing Holman and Sweeney shot by their co-conspirators. If they were responsible, being co-conspirators, for that act, the statement is a confession of a fact criminal in itself.

In addition to all that, both the appellants stated that they took the guns and pistols with them when they escaped from the penitentiary, and afterwards threw them away or hid them under a log, all except one pistol.

There is no dispute that Sweeney was killed by one of the men, a member of the admitted conspiracy. That was proved by the State, and was corroboration, with the confessions, sufficient to submit to the jury. So with the confessions and the required corroboration the Court would have been justified in submitting upon that evidence alone the question to the jury. To

say that these statements, as the Court does, were admissions and not confessions, is contrary to the purport of the admissions, and contrary to the ruling in the Porter case.

The Court cannot presume the existence of any evidence by the State that these admissions were voluntarily made. The Bill of Exceptions, in its recital of what occurred at the time of the offer and admission of the testimony, contains no evidence whatever upon the subject of the voluntary or involuntary nature of the statements. The Bill of Exceptions, therefore, is silent on that question. If there was any evidence offered to the Court by the State at the time, or at any time, that these confessions were voluntarily made, it was the duty of the District Attorney to see to it that such evidence was incorporated in the Bill of Exceptions. That is the unqualified and constant holding of this Court.

In *Dubois v. Perkins*, 21 Or. 189, it was contended that certain evidence was rendered competent by other evidence given upon the trial, but which was not in the Bill of Exceptions.

> "It was accordingly argued," says the opinion, "that for the purpose of sustaining the judgment, we must presume that such evidence was actually given upon the trial. *But this is not the correct rule.* While it is true that error will never be presumed, the converse of the proposition is equally true.

> When error does affirmatively appear, it will not be presumed that it was rendered harmless or removed. If it were so, the *respondent must see to it* that the matter which renders it harmless or removes it is made to affirmatively appear in the bill of exceptions."

In *Nickum v. Gaston,* 24 Or. 380, 392, the Court held a certain instruction to be error. It was contended by the respondent that as all the instructions were not in the record, it would be presumed that the Court elsewhere properly instructed the jury. The Court held against the contention, and in support of its ruling quoted the language above quoted from Dubois v. Perkins, to the effect that respondent must see to it that the matter which renders it harmless or removes it, is made to appear affirmatively *in the bill of exceptions."*

Again, in *Carney v. Duniway,* 35 Or. 131, 136, the Court was asked to presume that "the error in overruling a motion for a non-suit was cured or rendered harmless by some subsequent proceedings on the trial in the absence of a showing to that effect." The Court overruled the contention, and in support of its ruling quoted the language in Dubois v. Perkins, that the respondent must see to it that the matter which renders it harmless is made to affirmatively appear in the bill of exceptions.

Dubois v. Perkins was again cited with ap-

proval in *Cleveland Oil Co. v. Insurance Society,* 34 Or. 228, 235. The Court below had overruled a motion for non-suit, which was held error. It was contended that the evidence of defendant after the motion was overruled might have supplied the deficiency in plaintiff's evidence. The Court overruled the contention on the authority of *Dubois v. Perkins,* and remarked:

> "It was the duty of plaintiff (respondent) to include in the bill of exceptions those portions of the evidence given by defendant, if any, tending to supply such deficiency."

Dubois v. Perkins has been cited with approval and without qualification of its language and holding in the following additional cases:

Aldrich v. Col. R. Co., 39 Or. 263, 279.
Carter v. Wakeman, 45 Or. 427, 430.
Durkee v. Carr, 38 Or. 189, 196.
State v. Osborne, 54 Or. 289, 291.
Provo v. Spokane P. & S. R. Co., 87 Or. 467, 475.

The proceedings at the penitentiary were most extraordinary. It is not a case where a defendant under arrest makes statements to an officer, either voluntarily or involuntarily. The District Attorney, as the bill of exceptions shows, went to the penitentiary not only to interview the appellants but to get the statements reported by the official reporter, and to offer them as evidence at the trial. It was an inqui-

sition, by searching questions, to get from appellants all the evidence he could to be used against them.

1. Admitting the statements deprived the appellants of aid of counsel. Admit that ordinarily the right to such aid is only when the case is on trial. But this inquisition was conducted by the State in every respect as it would have been if on a trial, and the appellants as witnesses, except that they had no counsel and no court to protect them. The proceeding deprived them of the aid of counsel at the trial. The very things were already done which required his aid in the doing. He had no opportunity either to advise or make legal objections to the questions at the trial.

2. The proceeding compelled the appellants to testify against themselves. The defendant need not be a witness in his own behalf, and if he is not, it cannot be used against him. Yet the effect of taking their evidence out of court, and having it reported, and then using it against them in court, cannot be distinguished in matter of substance from calling him as a witness against his will at the trial.

3. The appellants were not informed of their right to make or not make a statement. The Court answers this objection by saying that the statute on the subject of proceedings before a magistrate "does not refer to any case such as

that disclosed in the evidence where the defendants are said to have conversation with the District Attorney concerning their presence and actions at the time Sweeney was killed." The statute does not apply to the proceeding, indeed, and for the simple reason that it does not contemplate that such proceedings can be had at all, *except before a magistrate.* Can we attribute to the legislature an intention to guard so carefully the rights of an accused before a magistrate, and then authorize these rights to be violated by the simple device of dispensing with the magistrate? The legal effect of the statute in question in prescribing the methods of the examination before a magistrate, is to negative such an examination by any other officer, or by any other methods. Therefore this proceeding, whether the statements were confessions or admissions, or voluntarily or involuntarily made, is not authorized by any law, and is wholly as void as any other extra-judicial proceeding. It is exactly such proceedings in the progress of tyranny that induced the Constitutional provisions that in effect provide there can be no trial, or any part of a trial, in a criminal case except in open court and before a jury.

We have referred to this as a capital case, but only for the purpose of invoking the law of strictness in favor of life applied everywhere in capital cases. Further than that we have made

no appeal to the sensibilities of the Court. The argument is addressed to the unimpassioned function of the Court to hold the law. It is not a prayer for a grace which the Court has no power to grant. It *is* a demand for a right which the Court has no power to withhold.

The Jury's Latitude in Fixing Penalty

The instruction referred to in our 27th assignment of error, quoted on page 982, printed opinion (here being 17th assignment of error) should have been given to the jury. It is consistent with section 131 of Oregon Laws, with section 16, Art. I of the Constitution of this State and with a like provision of the Federal Constitution.

Section 1903 of Oregon Laws gives to the jury the right to reduce the penalty in first degree verdicts to life imprisonment. This law was adopted in 1920 and substantially follows the provisions of an act of Congress of 1897. This act has been construed in *Hopt v. Utah,* 104 U. S. 631, 633 (43 L. Ed. 873), in which it is made clear that rules of evidence are broadened, admitting evidence formerly held inadmissible in some instances, as an aid to the jury in determining the degree of crime, or penalty to be imposed, as the case may be. This decision is cited, followed and clarified by the same court in *Winston v. United States,* 172 U. S. 303, 314 (43 L.

Ed. 456). Also: *United States v. Williams,* 103 Fed. (C. C. A.) 946-7, and *State v. Peltier,* 21 N. D. 192 (129 N. W. 451), where authorities to same point are collated.

With all due deference to the views expressed in the opinion in the present case to the effect that our requested instruction ". . . is faulty in that it invites the jury into the realms of speculation and imagination entirely outside of the pale of the law and evidence"; and that "it is an invitation to violate their oaths to try the case according to the law and evidence . . .", it is respectfully requested that the statement quoted be compared with the language of Mr. Justice Gray in *Winston v. United States, supra,* at page 633, where it will be observed that our request is in full accord with the forcible decision there rendered on this particular feature, and, except for changes in the phraseology, the language used by us is substantially the same, and in no sense varies from the purport thereof.

The views expressed in the court's opinion on this feature are in accord with the instructions given by the *trial court* in the *Winston* case, *supra,* but that court was reversed and a new trial ordered because of such instructions. As our statute follows that of the District of Columbia, previously enacted, it should carry with

it the construction given in its interpretation by the highest court of the land.

Self Preservation

This brings us to the point considered by the court respecting the right of self defense. In the interest of clearness the words "self preservation" should probably be used, in lieu of the expression "self defense", as the latter, although included in the substituted expression, occasions some confusion in its application. The soundness of the rules given on page 981 of the opinion are not open to discussion, nor did we question the soundness thereof, either in our argument at the hearing or in our brief. The rules quoted in the opinion have reference to cases of the usual homicides in combats between men, not involved here. However, even they are general in their nature and subject to exceptions, as in instances narrated in the opinion of Mr. Justice Moore, speaking for the Court in 43 Or. 161; also *State v. Godager,* 56 Or. 201; *State v. Dorris,* 51 Or. 136.

The right of self defense, or *self preservation,* as stated by Mr. Blackstone, in his Commentaries, Vol. 4, star page 186, is as follows:

> "There is one species of homicide (*se defendo*) where the party slain is equally innocent as he who occasions death; and yet this homicide is also excusable from the

> great universal principle of *self preservation,* which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish."

Our points inthis regard were raised and presented in the refused instructions relative to cruel and unusual punishment, and of the right of self defense being never waived.

Before proceeding, attention is invited to the statement in the opinion of the Court (pp. 977-8) in reference to our fifteenth assignment of error, urged at the hearing, in which it is assumed, as a premise, that the proffered testimony of Murray was the only evidence offered of dangers confronting defendants in the prison, in which, for months prior to their escape, they believed their lives continuously to be in peril. Murray's attempted examination was only referred to in this connection as a means of identifying the error relied on involving the right to defend against what they believed would be a continuance of cruel and unusual treatment, and eventual death at the hands of prison officials and employes in charge. The testimony of both Kelley and Willos in this regard appears to have been overlooked.

The *testimony* of Kelley, bearing on this feature, introduced at the trial, begins on page 55 of the bill of exceptions, and, in narrative form, is as follows:

Page Sixty-four—

Kelley's Testimony, in Part, at the Trial

(Page 55, bill of exceptions.) In 1924 I was in what is known as the Bull Pen, the first time in the dungeon in the Bull Pen for about fifteen days. I don't recall the number of days in the dungeon, but after I became so faint, which was in May during hot weather, they transferred me to cell number 1. (p. 56.) I was also there (in the bull pen) prior to that time on one occasion 31 days. On March 3, 1923, I was confined in the bull pen 25 days for attempting to escape. My conveniences in the cell were limited to two blankets, the sleeping accommodations consisting of a bunk with steel slats 2 inches apart, which was worse than sleeping on the floor. (57) I was given but one small meal a day. Was not allowed to communicate with any of my friends or with any of the outside world. I was limited to the seeing and conversing with the one in charge, except to holler over to adjacent cells. We were allowed to clean our own buckets about every other day, (58) sometimes every three days. No one came to see me while there except the one bringing the meals.

I never knew what the charges against me were, except through what I could gather from other prisoners mostly, and (59) seldom given a chance to explain or reply to any charges against me.

Guards Fired Into the Cells

(P. 59). There were two different occasions during 1924, while I was confined in the bull pen that Mr. Hinton, "who was known to be somewhat a killer, at least a potential one, fired down into the bull pen cells" while I was there. At the time of this firing the doors were locked. I was in cell number 3 and his firing was in cells number 7 and 8. There was absolutely no provocation whatever for this firing into these cells.

"Q. During the time you were incarcerated there, or in prison, did any knowledge come to you of any one having been injured or killed by being fired into?"

"A. Yes, sir."

"Q. State what your information was regarding that, that is, what you heard?"

"A. Before I came in 1923, in January, there was a man by the name of James Ogle —(60) had had different altercations with John Davidson, who had the reputation of having killed several convicts during his life, all in just such helpless condition as he (Ogle) was at the time." . . . "The information I received in that respect was that he was killed by Davidson as he was taking his exercise, walking around the ring, known as the bull-ring, and as I heard it as he made his first revolution on the ring, Davidson shot him from behind, killing him, then taking his body over the wall on a rope. Some one had put a rock down

close to the ground where he was killed, as an excuse for Davidson shooting him." All this information came to me while in prison and while I was in the bull pen. The effect this information had upon me was that "I had to eventually believe it, as it was substantiated by quite a number of prisoners that were there during the time. (B. Ex. p. 61.)

This had a depressing effect upon my mind, keeping me in "constant" ar "extreme" fear, all of which was in mind at and near my attempted escape.

I also had other information regarding the danger I was in if I remained in prison, —"I heard by one of the prisoners that there were several of us marked to be shot at the slightest provocation, my name being among them." There were six names on the list, four of whom was Tom Murray, myself, Jones, Willos, and myself, am not sure as to the other two.

"Q. I will ask what effect if any did your incarcerations in the bull pen, under the conditions you have named, have upon your feeling of safety in general, or mental state of mind."

"A. It was very severe on any one's mentality to be in constant fear of their life at all times, such as existed in my mind during my confinement in the Oregon State Prison." "It was very depressing."

(P. 62.) At times while there in the bull pen I had fever and headaches, but medical attention was very hard to get while there,

although requested of the chapel in charge.

This was followed, beginning on page 63, bill of exceptions, by *testimony* of Willos, which in narrative form is as follows:

James Willos (pages 63 to 77, Bill Ex.):

After I was in prison about sixty days, I was in May 1924, without being given any information as to why I was placed there. I heard later that it was because I was suspicioned as having worked on a tunnel intended for escaping purposes; but I had nothing to do with it. I was merely working in that neighborhood. As to why I was there none of those in charge or employed in connection with the prison ever explained to me, nor did I ever have a chance to ask them why.

(P. 65.) I was first placed in the dungeon on the north wing,—the bull pen was full at the time, being two in each cell. Two of us were placed in the dungeon where we remained eleven days. "The first night all our clothes were taken away from us" leaving us with no clothes on, —without any clothes on at all. During the eleven days we had to eat "a couple of slices of bread a day," with all the water wanted, the water being in the cell. In addition to this experience I was confined in the bull pen (67) because as stated I was not wheeling concrete up a platform fast enough, but I was sick at the time, and

when explained they merely replied "that's the old story". I was there that time 17 days, occupying the dungeon. (p. 68) This was in December, with no heat in the cells, could only keep warm by walking up and down the cells, fed but once a day with a small bowl of beans and two slices of bread. "I was never exercised during that seventeen days." The cell was cleaned out, every two to four days. The size of the cell was about five feet wide, six feet long and about nine feet high. I was there another time eleven days. The cell had no sleeping accommodations, that is in the dungeon where I spent eleven days,—no blankets, had no way to keep warm other than natural condition of the cell. This confinement was in October. It was raining continually, and I suffered with cold. I was sick when placed there, had inflammatory rheumatism and spitting blood, but could get no medical attendance, although requested. Carey, the employee in charge, saw the blood on the floor, but merely laughed at me.

(70-71) I never had a bath nor a change of clothing while in the bull pen. The effects upon me mentally and physically were bad,—I could do no physical work for some weeks afterward. I heard all about the shooting in the bull pen and "while I was in the bull pen I had other prisoners tell me what had took place already." Told me all about the killing of Ogle, the taking

of his body over the wall. I was also informed that I was going to be taken to the bull pen and shot. I saw the indentations on the walls of the cells into where I was told that shots had been fired at times; also saw the bullet holes in the walls where was told were fired by 30-30 rifle. All were fired while cells locked and prisoners unarmed. The fear of being shot at, or shot, was on my mind day and night. I was informed I "was to get the same thing",—be shot at or shot. When a fellow learns anything like that of course he wants to get away; that was the effect it all had upon me. While there I could not communicate with friends in any way.

(73) I was told on several occasions by other prisoners that there was fifty dollars reward for the man who would get me, which I believed, all of which had a bearing on my attempt to escape on August 12th, so "I thought if I could get away I would try it, on account of what the prisoners told me I was going to get killed, and that I had no chance . . ." I felt that I was in danger if I remained and in danger if I attempted to escape.

The foregoing undisputed statements in the record clearly disclose a treatment not justified in this day and age. This system of treatment has long since been abandoned in most state and federal prisons. In fact, to justify it is but to

apologize for the inefficiency of prison management where in use.

The right of self defense, or *self preservation,* as here presented, is far from being of the type considered in the court's opinion. It may be termed *sui generis.* The question of provocation in mortal combat between individuals in the usual sense, is not involved. The question of "retreating to the wall," etc., applicable to the cases usually presented, where men are engaged in an assault and one is in immediate danger, where the killer must make every reasonable effort to avoid the assailant; where he must retreat to the wall, etc., is not this case. Here defendants were within the walls, with no chance to retreat or to escape the threatened dangers at the hands of those in whose charge they were placed under the law. The record discloses no justification for the cruelty and dangers imposed upon them. It may be said that such is presumed, but even if so, evidence is presented by the accused adequate for the consideration of the jury, whose duty it was to decide that question, and who were entitled to instructions concerning the law applicable thereto. These defendants, if the jury accepts their testimony as true, either in whole or in part, were stripped of clothing, thrown into a dungeon, left without bedding or clothing for twenty-four hours, with but two pieces of bread each, without knowledge

of charges against them, and then held there for days to follow. At other times placed in the bull pen on charges of which they had no knowledge, refused medical attention, as Willos states, while in the dungeon sick and spitting blood, and without bedding, only to be laughed at by his keeper. The conditions as described by them are such that it is surprising that fatal illness was not thus forced upon them.

That to break them down in health by this cruel treatment as narrated, constitutes great bodily harm, and eventually to take their lives, whether through or as a result of such treatment, or to be shot, as stated, by one of the guards, on slightest provocation as one of the *marked six* to be killed, as from their undisputed testimony appears was done in the case of Ogle, who it seems was shot without cause, and shot in the back at that (as Kelley testified from information received) while exercising in front of the bull pen cells, or whether shot in their locked cells in the bull pen, into which guards had been firing without cause, upon helpless convicts therein, it must be admitted would constitute a felony.

Every human being, under the law of the land, whether statutory or fundamental laws, is entitled to equal protection, which guaranteed right includes what Blackstone terms "the great principle of self preservation which

prompts a man to save his life pereferable to another." This is an inherent right, regardless of statutory law. But we have a statute, Section 1909 of Oregon Laws, which provides that any one may defend himself from unlawful acts, and that killing may be justifiable *"to prevent the commission of a felony upon such person . . . or persons there named".*

This section is also supplemented by Section 2382 (O. L.), which reads:

> "The person of a convict sentenced to imprisonment in the penitentiary is *under the protection of the law* and any injury to the person not authorized by law is punishable *in the same manner as if he were not convicted or sentenced."*

The enactment of these statutes for the protection of a prisoner was manifestly intended to place the prisoner under the same protection of the law as any other person; in fact these statutes are merely declaratory of the law as it was and had been, and evidently intended to remove any doubt on the subject and to correct the cruel and inhuman treatment previously in vogue in handling prisoners.

If the defendants, as reasonable men (as to which the jury are the judges) believed they were in danger of loss of their lives, or of great bodily harm which would eventually result in death, or that they were slated to be killed on

slightest provocation, as claimed to have been done in Ogle's case, it might, in the judgment of the jury, have been ample grounds for their escaping in order that the cruel and dangerous incarceration, with dangers feared, might be avoided. If found by the jury that such afforded inducements to escape and made by reason thereof, it became a question for the jury to determine whether the homicide was such as defendants acting as reasonable men might have believed essential to their self preservation and return a verdict accordingly, whether for acquittal or for a lesser degree of crime; and if a first degree verdict, whether the penalty should be death or life imprisonment.

The law applies to all men, whether free citizens or convicts. "The constitution (and laws under it) follows the flag" to the ends of the earth,—prison cells not excepted.

The sentence imposed upon convicts is limited to the law under which imprisoned. Additional punishments, except such as may be for mere infractions of the rules, to preserve discipline, so long as reasonable, are enforcible, but whether the cruelty and dangers here complained of were reasonable, was for the jury's determination, under proper instructions by the court as to the law. The law contemplates proper food, not starvation, reasonable warmth, not solitary confinement in open cells without refer-

ence to the condition of the weather, and in open and flagrant disregard of needed exercise or of sanitary conditions. Prisoners are entitled to live out their sentences, not to be ruined in health or to have their lives unnecessarily shortened by cruel treatment, nor to be shot as defendants were led to believe was the case with Ogle, the killing of whom, under the unquestioned showing made, was felonious.

Supplementing the provision in reference to justifiable homicide, the statute further provides (O. L. Sec. 2821) that while the Warden may prescribe rules for the government of the prison, enforce *appropriate* punishment, etc., ". . . neither the Warden nor any prison official or employee shall have the right to strike or inflict physical violence except in self defense, *or to inflict any cruel or unusual punishment.*" The rules that a warden may make, of course, are limited in their extent and application. *They must conform to the law* and not be in conflict or inconsistent with it. We have on previous pages made clear that even the Court of the State, whether trial or Supreme, cannot legally do so. In this position we are sustained by all authorities on the subject, many of which are cited above. If courts cannot enforce rules inconsistent with the laws of the land, certainly wardens of state prisons are limited in their authority in this respect.

In re Birdsong, 39 Fed. 599 (4 L. R. A. 628), a federal prisoner was confined in a county jail. The sheriff, in order to enforce one of his disciplinary rules, had him chained to the ceiling for two hours or more (testimony varying as to time) in such way that only the front of his feet were on the floor. The federal court held this to be cruel and unusual punishment and found the sheriff guilty and sentenced him to pay a fine for violation of the law of the land forbidding cruel and unusual treatment. See also *State v. Whitaker,* 48 La. 527 (35 L. R. A. 561), *Weems v. United States,* 217 U. S. 349 (54 L. Ed. 793), holding to same effect. It will be observed that each of the cases cited held there was a violation of the restriction in our fundamental laws respecting cruel and unusual punishment; and in none of the incidents upon which the holding was based were the cruelties greater, and in some not equal to that with which these defendants had to contend. That this Court has recognized the restriction see *State v. Ross,* 55 Or. 450, 473, and authorities there cited with approval. In *Weems v. United States,* the defendant, who was serving a fifteen year prison term, was released on *habeas corpus* proceedings because of being required by law (not by rule of the warden of the prison) to wear a chain connecting his wrist with his ankle. Others, in cases there cited, were released for less cruelties.

The "imminent danger" theory is clearly inapplicable here. What may be "imminent" in one case may not be imminent in the same sense in another. In this connection all the surrounding circumstances must be considered. As shown, defendants were starving and in filth, without change of clothing, their dungeons and cells unsanitary, without adequate warmth or bedding, by degrees dying in the bull pen along with convicts, in adjacent cells, undergoing similar experiences, and upon whom guards were practicing with their rifles, with the "convict" targets behind barred iron doors, with openings sufficient to enable bullets fired into them to make indentations on the back walls, and bullet holes through the front iron framework, at no time permitted to communicate with outside friends either by letter or in person, it should be clear they were without opportunity to "retreat to the wall", as the usual rule would have it. The walls in fact were all around them in close and enclosed proximity, at times two in a cell or dungeon, with limited room for one, with defendants at all times conscious of the impending danger of being shot, as was Ogle, on slightest provocation.

The treatment, as thus repeated from time to time, without knowledge of charges against them, with no opportunity of defense legally or in person, or otherwise, was not the result of the

acts of one man or few men only, but of the entire force, of all officials and employees, including those killed in the escape. Then under the evidence given by Willos and Kelley, the felony to be committed and crimes being committed from time to time upon them, under their treatment, was, in their belief, confronting them without their fault. It was under these conditions that they decided upon an attempt for their self preservation by escaping from within, at risk of their lives in the attempt in lieu of believed eventual death from within. It may be that reasonable men should not have taken their view of it and that some would not and do not, but whether they were acting as reasonable men was for the jury to determine. What may constitute a reasonable action, or an act of a reasonable man, varies with different persons and under different circumstances. As stated in *State v. Doris*, 51 Or. p. 159, "The jury were entitled to everything which could reasonably be presented and fairly affect the judgment of reasonable men in passing upon like questions, and in that respect *an ideal man cannot safely be taken as a model* by which every defendant charged with a crime must be judged. It must be made to depend, *not necessarily upon what the common experience of men should be* in such circumstances, *but upon what they are.*" Citing on this feature, Wharton, Criminal Law, (9 ed.) sections 490, 1192.

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Under the unquestioned showing disclosed by the testimony of each of the defendants, the court should have instructed the jury along the lines requested:

(1) That they might determine the guilt or the innocence of the accused under their stated facts as applied to the law of self preservation, or defense;

(2) That the jury might determine the degree of crime committed, if any.

(3) That the jury might determine whether justified in returning a verdict, "without capital punishment".

Defendants Indicted as Citizens But Tried as Convicts

Defendants were indicted as private citizens, without averment of any attempt to commit a felony while trying to escape prison. Nor was the charge for an assault upon a guard or guards, the penalty for which is provided in Sections 2047, or 2048, of Oregon Laws. The indictment contains no charges bringing defendants within the provisions of either of these sections, hence insufficient for their trial and conviction thereunder. See *State v. Smith,* 11 Or. 205.

The record discloses throughout, including the opinion of this Court, that defendants were each serving sentences under commitments for a term of years. This being true, the court was without jurisdiction to try them, unless the rec-

ord *affirmatively* (not by mere inference only) shows them to have been within the jurisdiction of the court during the entire trial. *State v. Gilbert,* 55 Or. 596; *State v. Cartwright,* 10 Or. 193; *Hopt v. Utah,* 110 U. S. 574; *Crain v. United States,* 162 U. S. 625, cited with approval in *State v. Walton,* 51 Or. 576; 50 Or. 152.

The tenor of all these cases is to the effect that all jurisdictional proceedings must *affirmatively* appear in the record. In the record here it is made to appear that each of the defendants are serving terms in the Oregon penitentiary under commitments adduced in evidence. Section 2821 of Oregon Laws places prisoners under the exclusive jurisdiction of the warden of the penitentiary. He can only be removed for trial by *habeas corpus* proceedings. *State v. Wilson,* 28 Conn. 126.

The presumption indulged in by the Court in the Connecticut case in recognizing the jurisdiction of the trial court, is overcome in this instance by *prima facie* disclosures in the record rebutting any presumption to the effect that defendants were in court under any due process. On this point it is at variance with the holding of this Court in *State v. Gilbert,* 55 Or. 596; *State v. Walton, supra,* and authorities therein cited, and unsupported in all jurisdictions, except states having statutes expressly or implied-

ly justifying it,—not appearing in our statute, or at common law.

The Court in the Connecticut case, however, makes clear that the removal from the jurisdiction of the warden is first essential to the jurisdiction of the trial court, and we find no cases holding to the contrary. In fact, after careful research, all cases coming under our observation were tried after first removing the accused (by *habeus corpus* proceedings) from the jurisdiction of the prisons in which they were serving unexpired terms.

Under Section 824, Oregon Laws, a prisoner serving sentence for conviction of a felony cannot be removed from prison to give testimony in any case. His testimony must be taken within the prison. The statute provides that a defendant may give testimony in his own behalf. This must, under our fundamental laws, be in the presence of the jury. How then can this be done while in the custody and jurisdiction of the warden? This should be sufficient to indicate that it was contemplated that the accused should be removed entirely from the jurisdiction of the warden pending trial. This could only be done through *habeas corpus* proceedings. The statute makes no provision for trial of convicts while serving in prison. The judgment recited the presence of the defendants in court, but it is disclosed by the commitments introduced by the

State in evidence, and in fact throughout the entire proceedings, including the opinion of the Court on appeal, that the defendants were serving unexpired terms for commission of felonies. The alleged confession, (improperly admitted in evidence, as shown in our discission, *supra*, and as held in the authorities last above cited), was obtained in prison and offered and admitted in evidence over our objections. These commitments disclose that each of defendants have several years of unexpired terms to serve.

Furthermore, Section 2380, Oregon Laws, merely *suspends* all civil rights of convicts who may be serving less than life terms, but with prisoners serving *life sentences* they become *civilly dead.* (2381, O. L.) The only provision of the statute which makes provision for trial of homicides committed by prisoners during such period are specified,—Sections 2047-8, Oregon Laws. There are no crimes at common law in this state. They are limited to those provided by statute. Sections 2047-8 make such provision, the specification of which excludes any other class of prosecutions for the killing of guards, insofar as may affect convicts while serving unexpired terms for the commission of a felony. The holding to the effect that the commitments of defendants were properly admitted in evidence indicates that the trial was con-

ducted, in part at least, under the sections of the statute last cited.

As stated by Mr. Justice Bean, in *State v. Howard,* 41 Or. 53:

> "It is a fundamental principle of common law that a defendant cannot be tried for one crime and convicted of another."

Here we have the anomalous situation of the accused, having been indicted as citizens under a general statute for murder, but tried as convicts under special statutory provisions enacted to meet the crime for which they were tried. The Court was without jurisdiction. On the other hand, if they come within the general statutes for murder, without regard to the specific statutes above mentioned, then in the absence of a statute to that effect a trial could not be legally had until after the expiration of the sentences as provided in their commitments.

This could be done only by acceptance of a pardon, or at least not until after executive clemency granted, which does not appear. It does *appear of record,* however, that they were still serving the time prescribed in the commitments by which they were placed within the jurisdiction of the warden of the penitentiary.

If held that defendants may, without statutory law to that effect, be tried as any other private citizen, under the *general law* and that this

was such trial, then defendants are entitled to the provisions of section 1576, regarding the sentences imposed. In some states where the law requires execution within a limited period, *and* otherwise makes provision for trials of convicts while other sentences are being served, it is held that the sentence may be imposed and carried into effect, regardless of whether serving sentence for conviction of other felonies. But our statute (Oregon Laws, Sec. 1602) fixes a minimum of thirty days, but not a maximum. This provision is consistent with Section 1576 regarding concurrent sentences, providing that the time of imprisonment shall follow expiration of former sentences, in which it is stated that "if the defendant be in imprisonment upon a *previous judgment*" . . "the imprisonment must commence at the expiration of the term limited by the previous judgment."

It is well settled law that one serving a term in prison may refuse a pardon and remain in his prison during his term if desired. *Carpenter v. Lord,* 88 Or. 137 (171 Pac. 577); *United States v. Wilson,* 7 Pet. 150. In referring to *United States v. Wilson, supra,* Mr. Justice Burnett observes, "The doctrine of this case has never been disturbed by any ruling to which our attention has been directed." In that case Mr. Justice Marshall, in referring to the effect of a pardon observes: ". . . if it be rejected, we have no

power to enforce it upon him." In the Carpenter case, Mr. Justice Burnett, continues:

> "Carpenter's legal condition has been fixed by the judgment . . . that adjudication is declared by Section 756 (O. L.). It restrains the State as well as Carpenter (the prisoner). He is entitled to enjoy its privileges and protection as well as to sustain its burdens and no power resides in the executive to deprive him thereof."

Again, that,

> "To deny the prisoner or one petitioning for him in *habeas corpus* the right to urge this would be to deny him the *equal protection of the law.*"

At the time Sweeney was killed, as charged, these defendants were each serving sentences for felonies, and as the commitments in the record show, had some years yet to serve. The sentence (assuming they were in jurisdiction of the Court and in charge of the sheriff) requires, that within twenty days they be placed in charge of the warden of the penitentiary there to remain until date of execution fixed to take place some weeks after the expiration of the said twenty days. There is accordingly a period of imprisonment effective, after the expiration of the twenty day period and during the several weeks to elapse from the twentieth day until date of execution. Section 1576 (O. L.) uses the word "imprisonment" shall commence, etc., it is true; but if defendants' confinement in the

penitentiary awaiting execution is not "imprisonment," what is it? If as held in *State v. Carpenter,* a defendant under the law is entitled to refuse a pardon, and to deprive him of this right is "to deny him the equal protection of the law," then upon what theory may a distinction be made between him and others in prison, who may be convicted of other types of felonies? Where does the statute provide the exception; and, if found, is it in harmony with the fundamental laws? The law gives all the right to have their imprisonment fixed by a sentence beginning after expiration of the time fixed by a previous sentence; the statute makes no exception. Is it not for the prisoner to say after having been given a fixed term, in reference to which, as held in the Carpenter case, "It restrains the state as well as Carpenter,"—the prisoner? And as there further observed, to hold otherwise, "it would be equivalent to saying to him, 'You are bound by this decision of the Court but the other party to it and its officers may ignore it'."

The law in force at time of defendants' conviction under which their commitments were given them prevails. They were, under the law, entitled to refuse even a pardon and serve their full terms, without increase of punishment during such terms. Then, shall they, under the guise of an execution which under the statute

only prescribes a minimum time for execution, —(*not a time limit*) have the period prescribed in their former sentences and commitments shortened, in order that the state, which (as said in the Carpenter case) has the same restrictions upon it as the defendants, may blot out their existence before the termination of their former sentences. The statutes must all be read together. By doing so the construction we urge gives effect to all and the equal protection guaranteed defendants under the law is thereby recognized.

To hold otherwise would not only be to create penalties not authorized by statute, but to take from defendants rights guaranteed under the law of the land, *and in violation of the fourteenth amendment to the Constitution of the United States.* Shall it be said that the penalties given them under former convictions shall be taken from them and the greater or shortening their lives given instead? Their execution under the verdict of the jury may eventually be certain (if not reversed) in time anyway, but whether defendants for the convenience of the State must surrender rights exclusively their own (as held in *State v. Carpenter*) and thereby reduce both time and uncertainty, is for them and not for the State to say, whether the quick execution would be preferable to one delayed until the several years' imprisonment under

former convictions may end, like the acceptance of a pardon (as said by Mr. Chief Justice Marshall in *U. S. v. Wilson, supra,*) it is ". . . a deed, to the validity of which, delivery is essential, and delivery is not complete without acceptance." The sentence attempted to be fixed for execution prior to termination of defendants' terms of imprisonment, is void and inoperative because of the date fixed therefor to defendants' prejudice.

But we are told in the opinion that "The section (1576 O. L.) does not purport to exempt defendants from trial and judgment during the confinement in the penitentiary." The fault in this logic, when carried to its ultimate conclusion, is that to accept it as treated, would be to hold that the courts may do anything not forbidden by statute. No one will assert that common law crimes are enforcible in this state,—a statute is first required. We do not claim a prisoner is exempt from trial for other crimes; but insist that the trial and ultimate effect must be had according to law. The accused cannot be legally tried while in the jurisdiction of the warden of a state prison in whose charge he may be placed by statute. The trial must be had either after defendants' release from such prison by expiration of his term, or by acceptance of a pardon, or other process by which he may be taken from the warden's jurisdiction, whether tem-

porarily or permanently; and that convicted under the second offense he is entitled to the benefit of the law respecting the time when the execution of the sentence may be had.

The statement used in the opinion of the Court, so common in use with reference to it being shocking if the sentence could not be executed without awaiting the expiration of former sentence is but to beg the question. *Petio principii.* It assumes the major premise in place of establishing one upon which to base an argument. Nor does it license crimes with immunity as the Court states it. The criminal must suffer the penalty as by law prescribed. The question here goes to what *is* prescribed. The fallacy of the reasoning invoked may be clarified by asking how the Court's reasoning would apply if capital punishment were abolished, as it has been in the past in this state, also in one-third of the states in the Union, and in most of the other civilized nations of the globe?

The rule of law is aptly stated in *Ex. Rel. v. Meyers,* 44 Mo. 280, as follows:

"Courts have no common law jurisdiction in felonies, and powers they exercise are conferred by statute only." Continuing, "Separate sentences can only be passed upon the prisoner in the cases *and in the manner* pointed out by statute." It is also observed in this connection, that "In England, where the criminal practice is

largely founded on the common law, a different rule may prevail."

In that state, as appears in *Ex parte Allen*, 196 Mo. 226, the statutes provide for execution in case of death sentences without awaiting the expiration of former sentences. We have no statutes to that effect, Section 1576, Oregon Laws, being the only provision on the subject, except the section providing that the execution shall take place not less than thirty days after judgment entered, making the provision of these statutes exclusive of any other proceeding. No maximum time limit is fixed by this or any other provision of the statute, leaving this provision when considered in connection with Section 1576, with which it is consistent, to be carried out in the manner as in Section 1576 provided. As we have before stated, it will be found that in all states where the execution is upheld prior expiration of a previous sentence (unless a pardon duly accepted is ~~bad~~ had) place a maximum limit upon the date to be fixed for the execution, as for example in the State of New York, where the limit is placed at four months after judgment, and in California where a statute makes provision for trial and execution of sentences in capital cases committed by prisoners.

In the states and countries where capital punishment is not in force, *ad hominem* reasoning would hardly be available; in fact it

should be relegated to its proper sphere,—the law making bodies. But if to be presented on that line, it is met with the suggestion that, as shown by the commitments, defendants are serving sentences for the type of felonies in the commitments specified,—for a term of years only, defendant Willos, for example, for seven years, of which he has served about one-third the time allotted. Had the errors complained of not been incurred at the trial the verdicts against defendants could and probably would have been either for second degree or fixed at life imprisonment. This would have added, at his age, many years to the penalty already fixed under the previous conviction. To further illustrate: Assume one is serving a life sentence; there is always a reasonable chance for a "life timer", as with others, if demeanor and subsequent information justify it, of the sentence being materially commuted, but should one serving a life sentence add to it the crime of another unjustifiable homicide he must suffer the *increased* probability of having to serve for life without executive clemency. Such is the effect in states and countries where the infliction of death penalties are not in force.

The period of confinement in the penitentiary between the date of sentence, whether between the expiration of the twenty day period in which the prisoner must under the statute be re-

turned to the warden after sentence, *and* the weeks and months during which the defendants under the sentence of the Court must be imprisoned in the penitentiary and there remain until the date of execution is necessarily, under Section 1576 Oregon Laws, in every sense of the word an *imprisonment* and carries with it their added restrictions, customarily invoked respecting the confinement of prisoners sentenced to execution under the rules of the prison. It is so recognized in every definition and application of the term from the earliest history of legal jurisprudence to the present time. On this point Blackstone said:

> "Every confinement of a person is *imprisonment*, whether it be in a common prison, or in a private house, or even by forcibly detaining one in the public streets." See Webster's International Dictionary, p. 1083.

Then must it not follow that confinement in the Oregon penitentiary is an "imprisonment" within the meaning of Section 1576 of the Code? To say nothing of the fixing of the date for execution, how can an exception be read into the statute quoted, the result of which must result not only in the shortening of the former terms of imprisonment but the lives of defendants as well?

The punishment to be undergone prior to taking the life of a convict under sentence of death

was not uncommon in England prior to the birth of our Republic; and it was from this judicial grandparent that our laws are said to have emanated. Common law crimes are abolished, it is true, but much of the procedure is embodied in our statutes and thus enforcible. The provision in Section 1576 of Oregon Laws, as to *when* consecutive sentences begin to run, is one of them.

A fair sample of the punishment inflicted and enforced in England for centuries preceding our government, is the sentence, by the Court, imposed upon Robert Charnock and two other defendants, March 16, 1696, in which it was provided:

> "That you go from hence to the place from which you came and that from thence you be drawn upon a Hurdle to the place of execution, where you are severally to be hanged by the neck and cut down alive; your bowels and ..... to be cut from your bodies; and to be burnt in your view; your heads to be cut off, your bodies respectively to be divided into four parts; which heads and quarters are to be at the King's disposal. And God have mercy upon your souls."

It will be observed from the sentence imposed upon the defendants, as above quoted, that more than one step was to be taken before the final execution took place. While in this instance it is probable that no great length of time inter-

vened before the final execution was closed, it is a well known historical fact that there were innumerable instances in which punishment by imprisonment, with tortures accompanying it, took place during the period of time after sentence and preceding the date fixed for execution, a more humane remnant of which is the provision in Section 1576 of our code.

These conditions continued in force until the beginning of the eighteenth century, the echoes of which, in many instances, may be found in the various statutes throughout this country at the present time. Horrible as the penalties inflicted prior to adoption of our Federal Constitution, not only in England but here as well, the system had the support of practically the entire world, and for the many centuries preceding the institution of this government, it was contended and believed that to abolish the barbarous punishments inflicted "would be shocking to all sense of justice and *public security.*" Its supporters were as ardent and sincere in that regard as are those who during this assumed enlightened time earnestly support the extreme penalties, some of which include unnecessary cruelties in various ways, much of which are not only in violation of law, but clandestinely effectuated under the guise of prison rules, in many instances in violation of not only of the reason and spirit, but of the letter of the law.

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In the foregoing pages we have endeavored to point out what we deem prejudicial errors in the trial of this cause, as sustained in the opinion on appeal, which as pointed out we believe to be inconsistent and in conflict with the statutes, law of the land and opinions of this Court as previously promulgated, which if permitted to remain undisturbed, will evolve precedents not heretofore deemed wise under our system of jurisprudence and which continued will confront us with the dangers of our constitutional safeguards being eventually and "substantially frittered away." (*Hill v. People*, 16 Mich. 351.)

It has not been deemed, nor is it our province to discuss the guilt or innocence of the accused; that is for the jury, the consequences of whose verdict must necessarily depend upon whether given under instructions of the trial court in full conformity with the law.

That this was not done in the present case we believe we have fully shown, and as said by Mr. Justice Harlan, speaking for the Court, in *Crain v. United States*, as quoted above:

> "The defendant may be guilty and may deserve the punishment imposed upon him by the Court. But it were better that he should escape altogether than that the Court should sustain a judgment of conviction of an infamous crime *where the record does not clearly show that there was a valid trial.*"

Believing defendants have not had a valid trial; that they have been deprived thereby of rights guaranteed by our statutory *and* fundamental laws of the land, manifestly to the prejudice of defendants' rights, a rehearing is earnestly requested.

Respectfully submitted,

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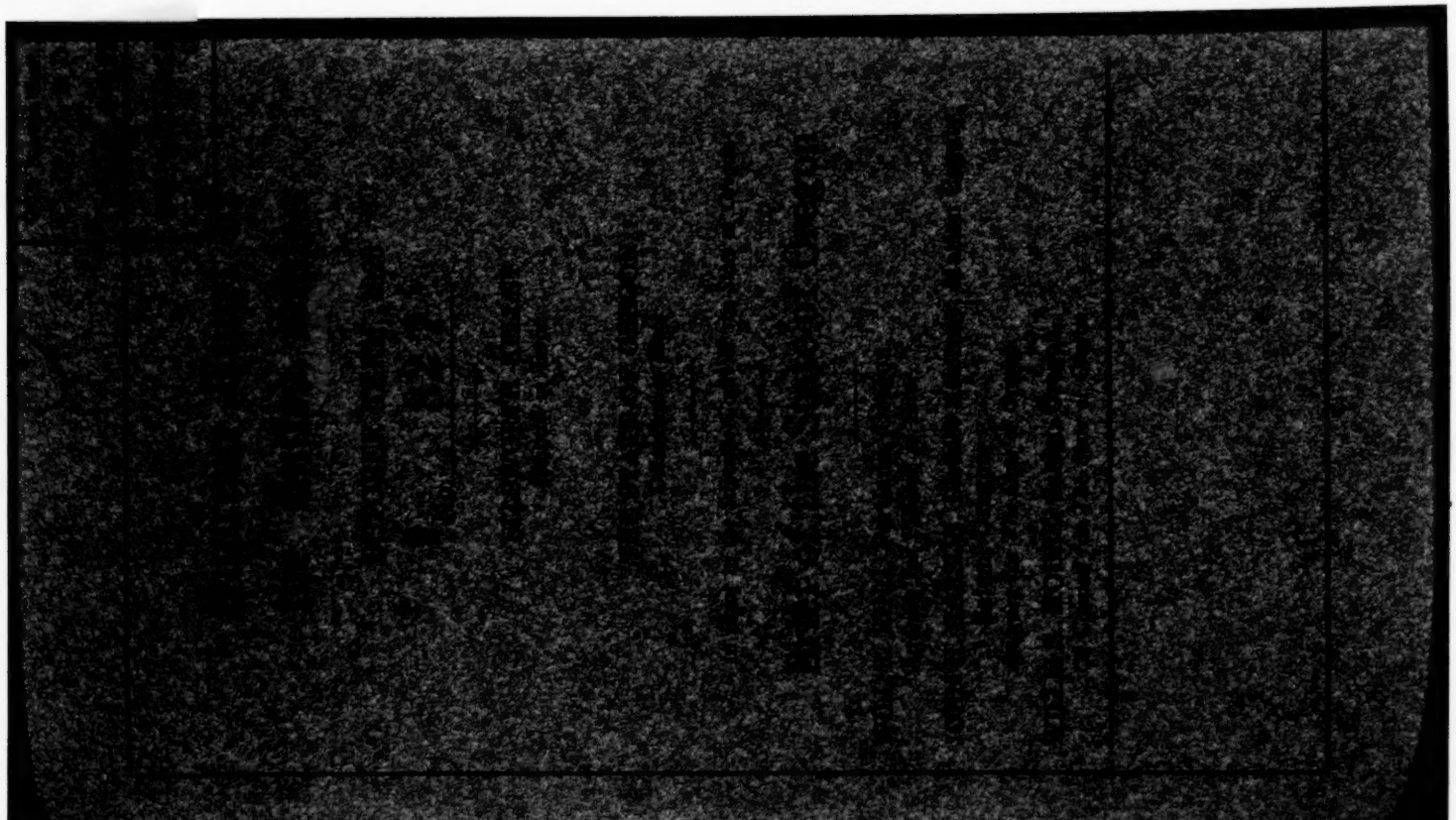

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1926

No._____

ELLSWORTH KELLEY
Plaintiff in Error

vs.

THE STATE OF OREGON
Defendant in Error

In Error to the Supreme Court of the State of Oregon

Brief of the State of Oregon

STATEMENT

Ellsworth Kelley, plaintiff in error, James Willos and Tom Murray were jointly indicted by the Grand Jury of Marion County, Oregon, for the crime of murder in the first degree under the provisions of Section 1893, Oregon Laws, reading as follows:

> "If any person shall purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree."

At the time of the commission of the crime set forth in the indictment, plaintiff in error and the two others accused with him were prisoners in the Oregon State Penitentiary at Salem, Oregon, and the crime was committed by them in their escape from that institution. John Sweeney, named in the indictment, was a guard at the institution and was slain in his attempt to prevent the escape.

Plaintiff in error was arraigned upon the indictment in the manner prescribed by the laws of Oregon, and upon such arraignment he entered a plea of not guilty to the indictment. The cause was then set for trial as to plaintiff in error and James Willos jointly indicted with him. The record shows that the cause came on regularly for trial, the plaintiff in error at all stages of the trial appearing in person and by Hon. Will R. King, one of his attorneys. Upon trial the jury returned into court a verdict of guilty as charged in the indictment without recommendation. Thereafter, and on Friday, October 30, 1925, plaintiff in error was sentenced to pay the penalty of death, as by the law provided. Judgment was entered on the same day.

Notice of appeal to the Supreme Court of Oregon was filed by plaintiff in error in the Circuit Court of the State of Oregon for the County of Marion on November 19, 1925, thereby initiating a proceeding to review the judgment in the cause in the Supreme Court of Oregon.

Upon the appeal the Supreme Court of Oregon affirmed the judgment of the trial court. 247 Pac. 146. After the denial of two petitions for a rehearing by the

Supreme Court of Oregon, plaintiff in error brings this cause to the Supreme Court of the United States upon writ of error allowed by the Chief Justice of the Supreme Court of Oregon.

POINTS AND AUTHORITIES

I.

The Supreme Court of the United States will recognize and be governed by the rule of practice in a state court prescribing the requirements to be observed in order to save a question for review in that court.

Erie Railroad Co. vs. Purdy, 185 U.S. 148;

Hulburt vs. Chicago, 202 U. S. 275, 281;

Dreyer vs. Illinois, 187 U. S. 71-77 to 80;

Barbour vs. Georgia, 249 U. S. 454;

Louisville & Nashville R. R. vs. Woodford, 234 U. S. 46, 51;

Layton vs. Missouri, 187 U. S. 356.

II.

On error to a state court the Supreme Court of the United States will not consider an alleged Federal question when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered, not being necessarily involved in the determination of the cause.

Harding vs. Illinois, 196 U. S. 78;

Union Mut. Life Ins. Co. vs. Kirchoff, 169 U. S. 103;

Levy vs. Superior Ct. 167 U. S. 177;

Messenger vs. Mason, 10 Wall. 510;

Jacobi vs. Alabama, 187 U. S. 133;

Layton vs. Missouri, 187 U. S. 356.

III.

The Supreme Court of Oregon not having decided a Federal question and none being necessarily decided against any specially set up claim of plaintiff in error, this court is without jurisdiction of the cause.

Klinger vs. Missouri, 80 U. S. (13 Wall.) 257.

IV.

To give the Supreme Court of the United States jurisdiction of this case because of a denial by the State court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time in the proper way. It must appear that the claim was made in the trial court because the Supreme Court of Oregon was only authorized to review the judgment for errors committed in the trial court.

Spies vs. Illinois, 123 U. S. 131-181;

Brooks vs. Missouri, 124 U. S. 394;

Baldwin vs. Kansas, 129 U. S. 52;

Jacobi vs. Alabama, 187 U. S. 133;

Harding vs. Illinois, 196 U. S. 87;

Thomas vs. Iowa, 209 U. S. 258;

Miller vs. Texas, 153 U. S. 535;

Erie Railroad Co. vs. Purdy, 185 U. S. 148;

Zadig vs. Baldwin, 166 U. S. 485-488.

V.

It is elementary that a federal question may not be imported into a record for the first time by way of assignments of error made for the purpose of review by this Court.

Manhattan Life Ins. Co. vs. Cohen, 234 U. S. 123;

Harding vs. Illinois, 196 U. S. 78.

VI

The contention that plaintiff in error was exempt from compulsory self-incrimination in the state court is not secured by any part of the Federal constitution, and therefore no federal question is raised.

Twining vs. New Jersey, 211 U. S. 78, 114;

Barrington vs. Missouri, 205 U. S. 483-486.

VII.

The conformity with the state constitution of the proceedings in the enactment of the law is a question for the determination of the state court.

Burt vs. Smith, 203 U. S. 129;

Haire vs. Rice, 204 U. S. 291;

Smith vs. Jennings, 206 U. S. 276.

VIII.

To try one already serving a sentence for crime involves no want of due process, nor is the jurisdiction of the trial court impaired by the manner in which the accused is brought before it.

Ker vs. Illinois, 119 U. S. 436; 7 Sup. Ct. Rep. 225;

Mahon vs. Justice, 127 U. S. 700; 8 Sup. Ct. Rep., 1204;

Pettibone vs. Nichols, 203 U. S. 192; 27 Sup. Ct. Rep 111;

Ex parte Lamar, 274 Fed. 160; 24 A. L. R. 864;

People vs. Groves (Cal. App.), 219 P. 1033;

People vs .Pratt, 78 Cal. 345; 20 P. 731;

Ex parte Ah Men (Cal.), 19 P. 380;

State vs. Owen (Or.), 244 Pac. 516.

IX.

A prisoner may be tried, convicted and sentenced for another crime committed either prior to, or during, his imprisonment — the penitentiary is no sanctuary.

21 R. C. L. pp. 1185-6;

Re Tranmer (Nev.), 126 P. 337; 41 L.R.A. (N.S.) 1095;

13 C. J., p. 919;

7 A. & E. Encyc. of Law (2nd. Ed.), 497;

State vs. Wilson, 38 Conn. 126;

Ex parte Lamar, 274 Fed. 160; 24 A.L.R. 864, at

Clifford vs. Dryden, 31 Wash. 545, 72 P. 96;

Arrowsmith vs. State, 131 Tenn. 480; 175 S. W. 545; L.R.A. 1915-E. p. 363;

State vs. Keefe, 17 Wyo. 227, 98 P. 122; 22 L.R.A. (N.S.), 896;

State vs. Griffith (W. Va.), 107 S. E. 302;

People vs. Sichofski (Cal. App.), 208 P. 340;

People vs. Groves (Cal. App.), 219 P. 1033;

Chapman vs. Scott, (D.C.) 10F. (2nd), 156, aff'd, (C.C.A.), 10F. (2nd) 690; pet. for wr. of cert. denied, 46 Sup. Ct. Rep. 354.

X.

The plaintiff in error can be legally sentenced to be, and can be legally, hanged for commission of the murder charged in the indictment, notwithstanding the fact that he is a convict confined in the penitentiary under unexpired sentence of imprisonment for the commission of other crime. He has no vested constitutional right to serve out his unexpired sentence.

Re Tranmer (Nev.), 126 P. 337; 41 L.R.A. (N.S.) 1095;

Peri vs. People, 65 Ill. 17, at 22;

People vs. Majors, 65 Cal. 138, 3 P. 597;

Brown vs. State (Tex.), 95 S.W. 1039;

Huffaker vs. Com. 124 Ky. 115, at 118; 98 S.W. 331;

State vs. Keefe (Wyo.), 22 L.R.A. (N.S.) 896; 98 P. 122;

Thomas vs. People, 67 N.W. 226;

People vs. Flynn (Utah), 26 P. 1114;

Gaines vs. State (Tex.), 53 S.W. 623;

People vs. Hong Ah Duck, 61 Cal. 387;

Ponzi vs. Fessenden (U.S.), 258 U.S. 254; 42 Sup. Ct. Rep. 309; 22 A.L.R. 879;

Coleman vs. State (Tex.), 33 S.W. 1083;

Kennedy vs. Howard, 74 Ind. 87, at 89;

Singleton vs. State, 71 Miss. 782; 42 A.S.R. 488; 16 So. 295;

Ruffin vs. Com., 62 Va. 790;

13 C. J., p. 919;

7 A. & E. Encyc. of Law (2nd. Ed.) 497;

Ex Parte Lamar, 274 Fed. 160; 24 A.L.R. 864, at 874;

State vs. Tranmer, 39 Nev. 142; 154 P. 80;

Ex parte Clark, 85 Cal. 203; 24 P. 726;

Chapman vs. Scott, supra.

XI.

Although the judgment and sentence in this case provide that the sheriff should deliver plaintiff in error within twenty days to the warden of the peniteniary and that plaintiff in error be hanged on a certain date thereafter, the interim between the delivery and the execution does not constitute "imprisonment" as contemplated in Section 1576, Oregon Laws. The confinement during the interim is but a mere incident and is in no sense punitive.

State vs. Wilson, 38 Conn. 126, at 135;

Re Tranmer (Nev.), 126 P. 337; 41 L.R.A. (N.S.), 1095, at 1101;

In re Herron, 77 N. J. L., 315; 72 A. 133, 16 C. J., 1332.

16 C.J. 1332.

XII.

As to the "due process of law" that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense.

Frank v. Mangum, 237 U. S. 326.

ARGUMENT

Our argument in this proceeding will be based upon several successive propositions, most of which go to the jurisdiction of this court to entertain the writ herein. We urge to the court that this proceeding must fail for any of the following reasons:

1. No Federal question was involved in the decision of the Supreme Court of Oregon and none was decided by it.

2. No title, right, privilege or immunity was "specially set up or claimed" by the plaintiff in error in the trial court so as to present any matter for review.

3. The contentions here made by plaintiff in error were never raised in the record under the state practice in such manner as to call upon the Supreme Court of Oregon to decide them and, therefore, they cannot now be urged.

4. The only claim of a Federal question remotely referred to in the record is the application of the Fourteenth Amendment to the Constitution of the United States to certain phases of the case under such circumstances as to make the claim frivolous.

We are satisfied that this court will view with amazement the record herein and the flimsy character of the material with which plaintiff in error will labor. It may be that the fact that this is a capital case induced a leniency in the issuance of the writ of error that would not be indulged in another sort of case. The humanness of such an attitude is readily understand-

able, but if the Supreme Court of Oregon could find no reversible error in the record under the state law and practice, and did not divide on any question in the case, and there was no federal question presented properly or decided, it is not so easily understood how it can reasonably be expected that with the same record and governed by the same laws and rules of practice this court can find and declare error where the Supreme Court of Oregon could not. Whether capital or otherwise, this case in its final analysis is to be disposed of under the same law that regulates and controls any other kind of criminal case. We do not wish to be taken as even seeming to reprove in any sense the course that was followed in passing this cause on to this court, but we do confess a lingering suspicion that the writ herein was improvidently allowed. There is not a substantial proposition offered to this court for determination anywhere in the record, and though it be contended there is a possibility of a doubt, still there is not enough matter tendered by the record for one to comprehend what it was all about in the first place.

We are prevented from complying strictly with the requirements of the rules of this court respecting form and arrangement of our brief for the reason that this brief is being written without having a copy of the brief of plaintiff in error or a copy of the printed record herein.

In elaboration of the summary which opens this argument, we shall be required to anticipate the argument of plaintiff in error and answer each assignment of error separately. In view of the fact that, excepting the first, every assignment of error urged by the plaintiff in error is not effectually presented by the record, under the law and rules of appellate procedure in Ore-

gon, we shall first mention as briefly as possible a few of the matters of such procedure whereby the fatally defective condition of the record may be clearly exposed.

An appeal to the Supreme Sourt of Oregon in a criminal cause is taken by notice thereof in writing served upon the County Clerk and District Attorney. (Oregon Laws, Sections 1610 and 1611). Thereafter the record must be transmitted from the trial court to the Supreme Court under the provisions of Section 1621, Oregon Laws, which reads as follows:

> "Upon appeal being taken, the clerk of the court where the notice of appeal is filed, must within 30 days thereafter, or such further time as such court, or the judge thereof may allow, transmit a certified copy of the notice of appeal, certificate of cause, if any, and judgment roll to the clerk of the supreme court.'

The certificate of cause mentioned in this statute is a certificate of the trial judge or a judge of the Supreme Court that in his opinion there is probable cause for the appeal. (Oregon Laws, Section 1617), and this certificate operates as a supersedeas or stay of judgment. Oregon Laws, Sections 1619 and 1620).

The judgment roll mentioned in the statute is provided for in Section 1582, Oregon Laws, which reads as follows:

> "Immediately after the entry of judgment, the clerk must prepare and annex together the following papers, which constitute the judgment roll:—
>
> "1. The indictment and demurrer, if there be one;

"2. A copy of the journal entry of the plea, the trial and verdict, and of any order involving the merits and necessarily affecting the judgment;

"3. A copy of the journal entry of the judgment;

"4. The bill of exceptions, if there be one.

"And in all cases the clerk must complete and indorse such judgment roll in the manner prescribed in subdivision 3 of section 208 of the Code of Civil Procedure."

These three things, the certified copy of the notice of appeal, certificate of cause and judgment roll, constitute the entire record of the case in the Supreme Court of Oregon and together are known as the transcript on appeal, as declared by the Supreme Court of Oregon in the case of State vs. Reinhart, 26 Or. 466 at 468.

The law then provides the limits of the power and authority of the Supreme Court of Oregon on the appeal in the following sections:

Section 1625, Oregon Laws:

"Upon an appeal the judgment or order appealed from can only be reviewed as to questions of law appearing upon the transcript;"

And Section 1626, Oregon Laws:

"After hearing the appeal the court must give judgment, without regard to the decision of questions which were in the discretion of the court below, or to technical errors, defects, or exceptions which do not affect the substantial rights of the parties;"

And Section 1627, Oregon Laws:

> "The appellate court may reverse, affirm, or modify the judgment or order appealed from, and must, if necessary or proper, order a new trial."

From these provisions of the laws of Oregon it will be seen that the judgment roll is the principal part of the transcript on appeal. (We might interpolate here that the original transcript on appeal in the Supreme Court of Oregon in this cause was lost while in the care of the attorney for plaintiff in error and it was necessary to supply the record with a new one. This will explain the unusual dates of filing in the Supreme Court of Oregon appearing on the transcript as certified to this court).

In this cause the several requirements of the judgment roll have been met and these all appeared in the transcript certified in response to the Writ of Error herein. No objection has ever been seriously urged by plaintiff in error to the regularity of any matter appearing from the judgment roll herein except as disclosed by the bill of exceptions. The whole basis of the appeal to the Supreme Court of Oregon was the bill of exceptions. This document became, and was, very important on the appeal and we shall, therefore, hastily deal with a few of the essentials of a bill of exceptions in Oregon.

The bill of exceptions in this case is in the form of a "skeleton bill", as it has been irreverently dubbed in the practice. It is made up in the trial court and must be settled and allowed by the trial judge. As stated by the course in the case of State vs. Clements, 15 Or. 237, at 246, respecting this sort of bill:

"The practice in regard to making up a bill of exceptions, ought to be thoroughly understood in this state. There has usually been but one course pursued regarding it ever since there has been an organized judiciary here; and that has been to make one general statement, reciting the general proceedings of the trial, a statement of the exceptions as they occurred, with sufficient of the evidence or other matter to explain them. That course must still be observed, unless changed by the legislature. It will not do for counsel to have transmitted here mere memoranda, in detached parts, of the proceedings had in a case, and expect that this court will consider the matter."

This statement of the law was substantially reiterated in the case of O'Connor vs. Van Hoy, 29 Or. 505, at 511.

The bill of exceptions must distinctly and affirmatively show error. The Supreme Court will not presume that the trial court erred and it will not hunt error. These statements of the law are supported by the following Oregon cases:

Thompson vs. Backenstos, 1 Or. 17, at 19;

Thompson vs. Uglow, 4 Or. 369, at 373;

Henderson vs. Morris, 5 Or. 24 at 29;

Monroe vs. Northern Pacific, etc., Co., 5 Or. 509, at 514;

Richards vs. Fanning, 5 Or. 356, at 360;

Parker vs. Monteith, 7 Or. 277, at 285;

Lahey vs. Knott, 8 Or. 198, at 201;

State vs. Ducker, 8 Or. 394, 34 Am. Rep. 590;

Tenny vs. Mulvaney and Bemis, 9 Or. 405, at 410;

Ladd vs. Sears, 9 Or. 244, at 248;

Long vs. Lander, 10 Or. 175, at 177;

State vs. Lee Yan Yan, 10 Or. 365, at 367;

Newby vs. Rowland, 11 Or. 133, at 134;

Tucker vs. Salem Flouring Mills Co., 13 Or. 28, at 30;

Danvers vs. Durkin, 14 Or. 37, at 38;

Coffin vs. Taylor, 16 Or. 375, at 378;

State vs. Brown, 28 Or. 147, at 162 and 167;

Cranor vs. Albany, 43 Or. 144, at 148;

Hill vs. McCrow, 88 Or. 299, at 308;

Daniels vs. Foster & Kleiser, 95 Or. 502, at 509;

Cathcart vs. Marshfield, 89 Or. 401, at 405;

O'Kelly vs. Territory, 1 Or. 51, at 58;

Jennings vs. State, 1 Or. 290 at 292;

State vs. Gallo, 18 Or. 423, at 425;

Carney vs. Duniway, 35 Or. 131, at 135;

State vs. Magers, 35 Or. 520, at 527;

State vs. Jancigaj, 54 Or. 361, at 363;

Pacific Laundry Co. vs. Pacific Bridge Co., 69 Or. 306, at 311;

State vs. McClard, 81 Or. 510, at 515;

State vs. Chapin, 74 Or. 346, at 350;

State vs. Gardner, 33 Or. 149, at 152;

Sharp vs. McCargar, 114 Or. 435, at 443.

It is further provided that the bill of exceptions should point out the error complained of in the admission of evidence and make it plain that under no combination of circumstances could the testimony have been admissible.

Pacific Laundry Co. vs. Pacific Bridge Co., 69 Or. 306, at 311.

Referring to the court's instructions, it has also been said that the rule is that error will not be presumed, and if an instruction asked, which correctly states the law, is refused, it is the duty of appellants to show by the bill of exceptions that no instruction was given embodying it, or set out in the bill of exceptions all the instructions given by the court, that it may appear whether the refusal to give the instruction was error.

Ayer vs. Moon, 59 Or. 599, at 602;

Dawson vs. Pogue, 18 Or. 94, at 99.

Another well grounded rule is that

> "Affidavits or other matters dehors the judgment roll as defined by the statute, are not part of the record, and cannot be considered on appeal from the judgment, unless incorporated into a bill of exceptions and thus made a part of the record." Shaughnessy vs. Kimball et al., 106 Or. 484, at 487;

Farrell vs. Oregon Gold Co., 31 Or. 463, at 472;

State vs. Chee Gong, 17 Or. 635;

Thompson vs. Backenstos, 1 Or. 17, at 18.

And generally, the following two rules of appellate practice are apt and applicable to this case:

> "If a party desires to raise a question in the Supreme Court of Oregon as to the competency of evidence offered in the trial court, or of any other supposed irregularity of that court, either of omission or commission, he must, at the time, make his objection, and thereby obtain a ruling of the court, and if adverse, he must save an exception and bring it to the Supreme Court by a proper bill of exceptions.

State vs. Foot You, 24 Or. 61.

> "It is not error simply, but error legally excepted to that constitutes ground for reversal in the Supreme Court of Oregon.

Kearney vs. Snodgrass, 12 Or. 311.

Applying these requirements to the record in this case would lead to the conclusion that there is not an argument from one end of it to the other. With them as a background it is readily discernible that the opinion of the Supreme Court of Oregon herein is based upon the law and the statutes of Oregon, and could not have been other than it was. They explain in a large measure the whole opinion of the court.

It is probable that our effort in this behalf has made up seem tedious in the extreme, but our purpose is to show that the law and rules of practice in Oregon prevented our Supreme Court from considering most of the points urged by plaintiff in error; and inasmuch as this court is dealing with the same record and is governed by the same law and rules of practice, we felt that the origin and substance of the same might be of help and also of consequence to this court.

We shall now discuss each assignment of error separately, applying to each the foregoing rules of appellate procedure in Oregon and the law as laid down by this court, to which reference has been made in our Points and Authorities.

ASSIGNMENT NO. 1

In this assignment it is urged by the plaintiff in error that the Supreme Court of Oregon erred in holding that Section 1903, Oregon Laws, was constitutional and not in violation of the Fourteenth Amendment to the Constitution of the United States, and in not holding that said provision in the Oregon Laws as enacted was illegal and void and in violation of the Bill of Rights of the Oregon Constitution and of the Bill of Rights of the Federal Constitution as well. The Supreme Court of Oregon in its opinion herein did not notice the contention here made by plaintiff in error.

This statute (Section 1903, Oregon Laws), reads as follows:

> "Every person convicted of murder in the first degree shall be punished with death, except when the trial jury shall, in its verdict, recommend life imprisonment, in which case the penalty shall be life imprisonment; provided, however, that this act shall take effect as soon as and whenever the constitutional provisions of section 36 of article I of the constitution of the state of Oregon relating to the death penalty, and any amendment or amendments thereto, will permit.'

The question sought to be raised by this assignment was never presented to the trial court. It is not in the record of the trial court, but it first appears in the assignments of error filed by the plaintiff in error on his appeal to the Supreme Court of Oregon and is set forth in his brief in that court as Assignment No. 16. The plaintiff in error has broadened his objection to the statute in his assignment to the Supreme Court of the United States by including in the latter assignment

that the provision of the law is in violation of the Fourteenth Amendment to the Constitution of the United States. As yet it has not been suggested by plaintiff in error in what manner Section 1903 was not enacted in conformity with either the Bill of Rights of the Constitution of the United States or of Article I of the Constitution of the State of Oregon. However, the Bill of Rights to the Constitution of the United States has been held by this court many times as operating on the Federal Government, and not a restriction on the states, and, therefore, any objection to Section 1903 of Oregon Laws arising out of rights assumed to be safeguarded by the Bill of Rights to the Constitution of the United States cannot be maintained. As to the failure of said provision of the law to have been enacted in conformity with Article I of the Constitution of the State of Oregon, we submit this is not a Federal question. (Points and Authorities VII.).

On three occasions recently in the following cases:

State vs. Rathie et al., 101 Or. 339, at 362;

State vs. Hecker, 109 Or. 520, at 532;

State vs. Evans, 109 Or. 503, at 507,

the Supreme Court of Oregon passed upon the constitutionality of Section 1903, Oregon Laws, now under attack in this court. In all these cases it was held by the Supreme Court of Oregon that the act in question was constitutional. And in one of these cases (State vs. Hecker, 109 Or. 520) it is said that, inasmuch as Section 37 of Article I of the Constitution of Oregon, reading as follows:

> "The penalty for murder in the first degree shall be death, except when the trial jury shall in its

> verdict recommend life imprisonment, in which case the penalty shall be life imprisonment."

is self-executing, the enactment of Section 1903, Oregon Laws, was really a work of supererogation on the part of the Legislature of Oregon. This constitutional amendment has not been attacked by the plaintiff in error, and no reference has thus far been made to it.

As constitutional questions cannot be raised for the first time in the assignment of errors in this court, it is unnecessary to advert to the Fourteenth Amendment to the Constitution of the United States and is applicability to the law in question. It may be said, in passing, that the law now under attack and the constitutional amendment which accompanies it are similar to other death penalty laws of the states. It cannot seriously be urged that the State of Oregon is without power to fix the penalty of death for the crime of murder, and having fixed that penalty in the manner provided by law of the state, and the law embodying the penalty having been sustained with respect to its constitutionality, there remains nothing for the decision of this court on the assignment.

ASSIGNMENT NO. 2

It is next assigned as error that the Supreme Court of Oregon erred in depriving plaintiff in error of his rights under the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States by refusing to give certain instructions in connection with the law of self-preservation and self-defense and in connection with cruel and unusual punishment said to have been inflicted upon plaintiff in error at the Oregon State Penitentiary. These requested instructions are set out at length further in the assignments of error herein. The first requested instruction referred to by plaintiff in error reads as follows:

> "I further instruct you, that under the State and Federal Constitutions, cruel and unusual punishment shall not be inflicted, and that if you find under the evidence in this trial, that the same was inflicted upon the person of this defendant within a reasonable time prior to, and immediately before the alleged prison break, and that defendant was living in enforced fear and belief of unlimited repetition thereof, and that his escape was the only means of avoiding the same, you should find the defendant, "not guilty".

The Supreme Court of Oregon adverted to this requested instruction in its opinion, although it was unnecessary to do so in view of the condition of the record. The court there said in connection with this request that plaintiff in error is not the judge of the question of punishment; and even if he had the right to escape, he would not have the right to kill. This was a prosecution for the murder of a guard at the Oregon State Penitentiary by plaintiff in error and two

other convicts. The requested instruction with this in mind is absurd. That he should be acquitted of the crime of murder committed by him in escaping from the prison if escape were the only means of avoiding cruel and unusual punishment is a vicious proposition of law to ask the court to declare. The bill of exceptions does not show that the jury was not instructed on all phases of the law concerning which the plaintiff in error contended there was some testimony, and in the absence of this showing it is to be presumed that the trial court did its duty in the matter.

The second requested instruction which it is claimed was not given by the trial court reads as follows:

> "Some evidence has been admitted showing certain statements and admissions made by defendants, but not under oath. I instruct you that while signed statements or admissions are admissible, and may be considered in your deliberations, they are to be viewed with caution, and in considering them you may take into consideration all the circumstances under which made, whether under fear, hope of reward, or any other circumstance surrounding the same which may during the trial come to your attention."

The bill of exceptions does not disclose but what a similar instruction embodying the same proposition was given to the jury by the court and, hence, it was impossible for the Supreme Court of Oregon to say that error was committed. The presumption being otherwise, this assignment is not available to defendant in error. We suggest, however, that the assertion in the instruction that signed statements and admissions of an accused are to be viewed with caution is not a correct exposition of the law, either in Oregon or elsewhere.

The third requested instruction about which complaint is made reads as follows:

> "The right to qualify a verdict of murder in the first degree or guilty of murder in the first degree by adding the words, "We recommend life imprisonment", is thus conferred upon the jury in all cases of murder in the first degree. The law does not itself prescribe any rule defining or circumscribing the exercise of the right, but commits the whole matter of its exercise to the judgment and conscience of the jury. This being the law, you are not limited in your deliberations to the testimony adduced at the trial, nor is it dependent upon mitigating or palliating circumstances, you are accorded the privilege, under the law, of making such recommendation for whatever reason your conscience may dictate; and if after taking into consideration the entire evidence, whether such evidence shall be sufficient in your judgment to establish the insanity defense relied upon beyond a reasonable doubt or not, you are at liberty to take into consideration any or all evidence, if any, adduced for that purpose in determining whether in the exercise of your discretion or conscience with reference to such recommendation, you may return a verdict with recommendation for life sentence as I have stated, or disregard the same and return such verdict whether for or without a recommendation of life imprisonment. And in this connection, I instruct you, that as to how far considerations of age, sex, illness, if any, or mental impairment, if any, or intoxication, of whatever nature or kind, if any, or human passion, or weakness, or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist, which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, all of which

committed by the constitution of this state and legislative enactment based thereon to your sound discretion, and to your sound discretion alone."

This requested instruction is virtually a copy of part of the opinion of this court in the case of Winston vs. U. S. 172 U. S. 302-312. In the main it is applicable under the Oregon Law. Plaintiff in error, however, inserted in the instruction this amazing clause: "* * you are not limited in your deliberations to the testimony adduced at the trial * *." As the Supreme Court of Oregon pointed out in its opinion, this clause was a direct invitation to the jury to violate its oath (Oregon Laws, Section 131) to "give a true verdict according to the law and the evidence as given them on the trial." This request is in the same category as the others, inasmuch as the bill of exceptions does not show what the court actually instructed the jury.

These exceptions were never properly presented to the Supreme Court of Oregon to require its attention, and not being properly presented under the rules of procedure in the State Court, this court has precluded itself from considering them. The record does not show any special claim made by plaintiff in error under the Constitution of the United States. No constitutional or Federal question respecting these requested instructions was seriously argued by plaintiff in error in the Supreme Court of Oregon. But even if the matter were properly presented, the giving, or failure to give, instructions of this character does not raise a Federal question.

The only instance any reference is made to the Constitution of the United States in any of the requested instructions is in the first request above set

forth, wherein it is said that "* * * Under the State and Federal Constitutions cruel and unusual punishment shall not be inflicted." This reference is of no value to plaintiff in error on two grounds. The first is that the provision in the Federal Constitution referring to punishment is the Eighth Amendment which does not operate upon the State, and the second is that the provision is directed to the fixing of punishment by law by the legislative body and has no application to individual action or conduct in any event. (In re Kemmler, 136 U. S. 447).

ASSIGNMENT NO. 3

Plaintiff in error urges upon this assignment that the Supreme Court of Oregon erred in declining to pass upon an objection lately found by plaintiff in error to the instructions to the jury of the trial court. As before stated, the plaintiff in error did not attach to the bill of exceptions herein the instructions actually given the jury by the trial court. There is before this court, and there was filed in the Supreme Court of Oregon, a document purporting to contain all the instructions given by the trial court to the jury in the case. These instructions were filed in the Supreme Court of Oregon long after the record on appeal was made. They had no place in the record of the Supreme Court of Oregon, and they have no place in the record before the Supreme Court of the United States. It appears conclusively on the record, and this assignment admits, that no exception was taken to the instructions given the jury by the trial court at the time they were given, as required by law. It was then thought that the instructions were entirely fair, and it was only after months of close application that the plaintiff in error was able to discover what he contends was an erroneous instruction.

The Supreme Court of Oregon, in its opinion in this cause, declared in conformity with its prior decisions that inasmuch as no exception had been taken to the instruction in question, it was powerless to review it. Since the Supreme Court of Oregon was unable under its rules and decisions to pass upon the question sought to be presented, we urge to this honorable court that the objection cannot be heard here.

ASSIGNMENT NO. 4

This assignment relates to the introduction in evidence of an extra-judicial statement made by plaintiff in error to the District Attorney of Marion County, Oregon, at the Oregon State Penitentiary. Plaintiff in error asserts that the Supreme Court of Oregon erred in holding that plaintiff in error was lawfully "examined" under the circumstances. Again, the rules of procedure established by the laws and decisions of court of Oregon prevent an investigation of this question. It is the duty of the State in a criminal trial in Oregon to establish to the trial court that a confession made by an accused is voluntary and not brought about through fear, force, or the hope of reward. This is a preliminary matter of law for the trial court to determine. In this instance the trial court determined from the showing of the State that the alleged confession was properly obtained and that it was admissible. The bill of exceptions does not contain this showing, and does not challenge its sufficiency otherwise, and, consequently, there was nothing for the court to decide on the objection, and the Supreme Court of Oregon so held in its opinion herein.

Reference to the last paragraph of Exception Number Eleven in the bill of exceptions upon which this assignment is based will show that the objection to the offer of the confession or admission is that the plaintiff in error was not "apprised of his constitutional rights of counsel." This is the only reference to the constitution in the objection. Constitution of Oregon, Article I, Section II, is substantially the same as the Sixth Amendment to the Constitution of the United States respecting an accused's right of counsel. They both

refer to criminal prosecutions, and not to matters going on before. The Sixth Amendment has nothing to do with the matter and the plaintiff in error would, therefore, be relegated to whatever rights he might have under the state constitution. Moreover, the mere averment that he had not been apprised of his constitutional right of counsel is insufficient to raise the question. (Points and Authorities II.)

But assuming it has been raised on the record, still under the ruling of this court in Barrington vs. Missouri, 205 U. S. 483-486, the question is not subject to review in this court.

We suggest, too, in this regard that the reference to the Fourteenth Amendment to the Constitutional of the United States in the assignment of errors herein is belated, and not having been urged before cannot be effectual now. (Points and Authorities V.).

ASSIGNMENT NO. 5

This assignment is based upon the provision in the judgment of the trial court that within twenty days of the date of the judgment (October 30, 1925), that the Sheriff of Marion County, Oregon, should deliver the plaintiff in error to the Warden of the Oregon State Penitentiary for the execution of the sentence. This provision of the judgment is in conformance with the statute, Oregon Laws, Section 1602-1, excepting where that statute has been affected in minor particulars by subsequent legislation with reference to the change from superintendent to Warden of the institution. We assume that it is argued that the interim between the judgment and the execution is imprisonment and consequently, under the provisions of Section 1576, Oregon Laws, the judgment should have provided that the execution be deferred until the expiration of a prior twenty year sentence which the plaintiff in error was serving at the time of the murder. This statute, (Section 1576, Oregon Laws), reads as follows:

> "If the defendant is convicted of two or more crimes, before judgment on either, the judgment must be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of such crimes; and if the defendant be in imprisonment upon a previous judgment on a conviction for a crime, the judgment must be that the imprisonment must commence at the expiration of the term limited by such previous judgment."

The plaintiff in error does not attack the above law as being unconstitutional, but he does declare that the construction placed upon it by the Supreme Court of Oregon abridges his rights under the Fourteenth

Amendment to the Constitution of the United States. Taking the propositions of plaintiff in error as they come, it is suggested that the interim between judgment and execution is not imprisonment in its broad sense, but it is a detention incident to the judgment and execution. It is in no sense punitive. (Points and Authorities XI.). Therefore, the stipulation as to the interim is not violative of the law quoted.

The next question would then be whether or not the plaintiff could be legally executed prior to the expiration of his twenty year sentence. We have cited in our Points and Authorities (VIII, IX and X) many cases that either directly or on principle sustain the conclusion reached by the Supreme Court of Oregon respecting the above statute.

The Supreme Court of Oregon, in passing upon questions sought to be raised in this assignment and in construing the statute above set forth, held that the imprisonment provision thereof had nothing whatsoever to do with the infliction of the punishment of death. This construction of this statute is in line with the construction of a somewhat similar statute by the Supreme Court of Nevada in the case of Re Tranmer (Nev.), 126 P. 337, 41 L.R.A. (N.S.) 1095. The statute in Nevada differs from the statute of Oregon in that the second sentence of the Oregon statute does not appear in the Nevada statute. In construing the word "imprisonment" in the Nevada statute, however, the Supreme Court of Nevada had this to say:

> "The word 'imprisonment' in the statute denies the contention of counsel for petitioner, for the reason that, if a death punishment were inflicted, it would present a different character of punish-

ment than designated in the statute in question, because the statute contemplates, even if there was merit in counsel's contention on this point, a sentence of imprisonment, and not a death penalty."

This construction of the statute by the Supreme Court of Oregon is consonant with reason and authority. So being, the decision of the Supreme Court of Oregon construing its own statute in the manner in which it was done in this case, presents no federal question for the consideration of this honorable court.

ASSIGNMENT NO. 6

The record is wholly insufficient to raise the question of the jurisdiction of the trial court of the person of plaintiff in error. Under the statutes of Oregon (Sections 1621 and 1582), on appeal to the Supreme Court of Oregon, it is not necessary to show how jurisdiction of the person of an accused attached. He is presumed to be in court by virtue of proper process until the contrary is shown. (State vs. Reinhart, 26 Or. 468). The record before this court establishes unquestionably that the plaintiff in error at all stages of the trial from the arraignment to judgment was in the custody of the Sheriff of Marion County, Oregon, the officer of the Court. Nowhere in the record is this disputed. There is a copy of a motion and affidavit "for an arrest of judgment" in the printed record which suggests that a deputy warden of the Oregon State Penitentiary was the immediate custodian of the plaintiff in error at the trial and that plaintiff in error was detained during the trial at the prison. In this connection, it may be said that the Oregon State Penitentiary is located at Salem, Oregon, where plaintiff in error had his trial and at a distance of no more than two miles from the courthouse in which the trial was conducted.

It is not intimated, and it cannot be shown, that plaintiff in error did not have a full and fair opportunity to make his defense at the trial regardless of the manner of his being physically produced in court.

No plea to the jurisdiction of the court was interposed, but, on the other hand, a plea of "not guilty" was entered and the record does not show that any objection to the jurisdiction of the trial court was at

any time made by the plaintiff in error throughout the whole trial and for nearly two months after judgment.

This matter of questioning the jurisdiction of the court over the person of plaintiff in error is patently an afterthought.

We can virtually demonstrate our statement in this respect. Oregon Laws, Section 1560, relating to arrest of judgment in a criminal cause, reads as follows:

> "A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant on the plea of a former conviction or acquittal. It may be founded on either or both of the causes specified in subdivisions 1 and 4 of section 1491, and not otherwise. The motion must be made within the time allowed to file a motion for a new trial, and both such motions may be made together, and heard and decided at once or separately, as the court may direct."

Section 1491, mentioned in the foregoing statute, declares the grounds of demurrer to an indictment, the pertinent subdivisions thereof reading as follows:

> "The defendant may demur to the indictment when it appears upon the face thereof either,—
>
> "1. That the grand jury by which it was found had no legal authority to inquire into the crime charged because the same is not triable within the county;
>
> "4. That the facts stated do not constitute a crime."

It, therefore, appears that an arrest of judgment can only be allowed for defects in the indictment appearing on the face of the indictment. The objection urged in

the motion did not appear on the face of the indictment and could not be availed of in a motion in arrest. But there is an additional statutory reason that the motion should not be noticed.

The statute above set forth requires that the motion be made within the time allowed to file a motion for a new trial. The statute relating to new trials in criminal causes is known as Section 1559, Oregon Laws, and reads as follows:

> "Chapters VII and VIII of title II of the Code of Civil Procedure shall apply to and regulate exceptions and new trials in criminal actions, except that a new trial shall not be granted on the application of the state."

Section 175, Oregon Laws, is a part of Chapter VIII of Title II of the Code of Civil Procedure, the salient feature of which reads as follows:

> "A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed within one day after the entry of the judgment sought to be set aside, or such further time as the court may allow * * *."

No allowance of additional time for filing the motion was ever made by the court and by filing the motion on December 24, 1925, plaintiff in error was approximately fifty-three days late. The trial court naturally overruled the motion because it was both ill-timed and not well taken.

So much is bad enough, but the record is even worse. Under the practice in Oregon and the decisions of the Supreme Court which we have heretofore mentioned, it is necessary to incorporate in the bill of

exceptions all affidavits, motions and the like that otherwise would not appear in the record on appeal. The motion in arrest in this case would necessarily need to be part of the bill of exceptions to merit consideration by the Supreme Court of Oregon. Nothwithstanding the practice and the decisions of the court, plaintiff in error did not incorporate the motion in his bill of exceptions, but instead merely took a certified copy of the motion, affidavit and order and filed it originally in the Supreme Court of Oregon. The Supreme Court did not notice the motion, affidavit and order, in conformance with its prior decisions respecting matters of the kind, and passed over the point sought to be raised. It is assumed that that was the action of the court, although it could have read it and deemed it so utterly devoid of merit as not to justify its mention.

The plaintiff in error now lugs the same motion, affidavit and order into this court, and bases, and will base, on them his entire argument as to lack of jurisdiction of his person and ask this court to take cognizance of a matter that never has been properly before the lower court. In short, plaintiff in error seeks the aid of this court on a gratuitous record and urges that the judgment below be reversed on a point that was never, and can never, rightfully be before the state court.

Assuming, however, that the matter is presented for determination, we urge that no lack of jurisdiction of the person appears. It seems that a distinction is to be drawn between jurisdiction of the subject matter and jurisdiction of the person. The former is never waived, whereas, the latter can be waived by failure to object. The argument will be advanced that since the plaintiff

in error was a convict in the Oregon State Penitentiary, an institution directly under the executive branch of our state government it was legally impossible for the person of the plaintiff in error to be surrendered to the process of the court in this case. To date, plaintiff in error has not cited any authority to sustain his contention, and we have found none.

There is no law of the State of Oregon which requires any different procedure in a criminal prosecution of a convict from the procedure employed in cases involving others. There is no law respecting the manner in which a convict is to be produced in court to stand trial, and there is no law that he shall not be produced. On these matters the Oregon Law is absolutely silent. In fact, the situation in Oregon is similar to the situation respecting Federal prisoners' being tried in state courts for public offenses mentioned by the court in the case of Ponzi vs. Fessenden, 258 U. S. 254, wherein it is said that although there is no express authority for the Attorney General of the United States to permit the removal of a Federal prisoner for a state trial, his right to do so cannot be doubted.

Or, again, as said by the court in the case of Gaines vs. State (Texas), 53 S. W. 624:

> "Appellant excepted to the action of the court in having him brought from the penitentiary at Rusk (he being confined there on another case) to stand his trial in this case, it being contended that it was not competent for the state to do this. There is nothing in this contention. While we know of no procedure authorized by legislation to bring a defendant from the penitentiary to some court for trial in another case, yet there is no law to the contrary, and such has been the usual practice; and we fail to see how a defendant can be heard to com-

plain that the penitentiary authorities surrendered him to the local authorities for trial on some indictment pending against him. The legislature has authorized the penitentiary board to make certain rules in regard to the conduct of the convicts confined and under their charge, and we understand the prison authorities have provided a rule recognizing the authority of district judges to issue writs for prisoners confined in the penitentiary to be brought before the court for trial in any case that may be pending against them. This would seem to be sufficient authority to bring the prisoner before the court. At any rate, in the absence of some express provision prohibiting this, we fail to see how the prisoner can complain. The Constitution guarantees him a speedy trial, and at his request he would be entitled to be tried in cases pending against him, although he might be confined in the penitentiary. On the other hand, if he should be serving a term of punishment in the penitentiary that extended over a number of years, and at the same time an indictment should be pending against him for some graver offense,—it might be rape or murder,—there would be no means to bring him to trial until the sentence in the case which he was serving had terminated, and perhaps in the meantime the witnesses against him might die or be so scattered as that a prosecution could not be maintained by the state.'

The presence of the plaintiff in error in court in this case is proof enough that he was surrendered by proper authority for trial and the full and complete opportunity afforded him to make his defense removes any question of due process in the matter. We take it that that this court will not concern itself with the methods or arrangements of local authority with respect to the disposition for trial of a state prisoner where the trial of such prisoner was conducted in accordance with "the

law of the land" and not in violation of any unquestioned Constitutional rights.

The argument that the presence of the plaintiff in error at trial should have been procured through a writ of habeas corpus is sufficiently answered by reference to Oregon Laws, Section 627, wherein it is provided that every other writ of habeas corpus except ad subjiciendum is abolished.

For all that appears in this record, there is nothing to indicate that the very things plaintiff in error argues should have been done were not in fact done. But whether done or not done, we submit no Federal question has been raised and this court is without jurisdiction to review the judgment on this assignment.

The remaining matter in the assignments of error is an address made by the attorney for plaintiff in error at the time a new date was fixed by the trial court for the execution of the judgment, the former date therefor having passed during the time the cause was on appeal to the Supreme Court of Oregon. Nowhere else in the record will this address be found. It was an occurrence subsequent to the judgment sought to be reviewed in this proceeding and is in no wise connected with it. Why the record here should be burdened with it is not apparent. There is no authority for it under either the Oregon law or practice and, consequently, it cannot be considered.

It is obvious from the opinion herein of the Supreme Court of Oregon (247 Pac. 146) that no federal question was considered or decided by it. The judgment of the trial court was affirmed on grounds sufficient under the state law and practice without reference to any supposed Federal question. It is not an instance of

studied refusal to determine the rights of a person under the Constitution or laws of the United States, and the judgment did not necessarily determine a federal question. It is simply an instance of a wholly defective record and the inevitable result of attempting to build on it. The decision of the Supreme Court of Oregon was foregone under the circumstances and the record is worse here than it was in the state court.

In conclusion, we reiterate that no matter has been urged by the plaintiff in error or disclosed by the record that has the remotest tendency to invest this court with jurisdiction of the cause and the power to review. We submit, therefore, that the judgment herein ought not to be disturbed, but, on the other hand, the writ should be dismissed for want of jurisdiction.

Respectfully submitted,

JOHN H. CARSON,
District Attorney for Marion County, Oregon, Attorney for the State of Oregon.

WILLIS S. MOORE,
Of Counsel for the State of Oregon.

SUPREME COURT OF THE UNITED STATES.

No. 827.—October Term, 1926.

Ellsworth Kelley, Plaintiff in Error, *vs.* State of Oregon.	In Error to the Supreme Court of the State of Oregon.

[April 11, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

Ellsworth Kelley, plaintiff in error, James Willos and Tom Murray were jointly indicted by the Grand Jury of Marion County, Oregon, for the crime of murder in the first degree under the provisions of section 1893, Oregon Laws, as follows:

"If any person shall purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree."

At the time of the commission of the crime set forth in the indictment, Kelley and the two others accused with him were prisoners in the Oregon State Penitentiary at Salem, Oregon, and the crime was committed by them in their escape from that institution. John Sweeney, named in the indictment, was a guard at the institution and was slain in his attempt to prevent the escape.

The plaintiff in error was arraigned upon the indictment in the manner prescribed by the laws of Oregon, and upon such arraignment he entered a plea of not guilty to the indictment. He and Willos were tried together. The cause came on regularly for trial. The jury returned into court a verdict of guilty as charged in the indictment without recommendation. On October 30, 1925, plaintiff in error was sentenced to pay the penalty of death as by the law provided. Judgment was entered on the same day. Appeal was taken by the plaintiff in error to the Supreme Court, which affirmed the judgment of the trial court, (*State* v. *Kelley,* 118 Ore. 397) and denied two petitions for rehearing. Thereupon the

case came here upon writ of error allowed by the Chief Justice of the State Supreme Court.

An examination of the record satisfies us that there is really no Federal question in the case, and the errors assigned purporting to raise questions under the Constitution of the United States are frivolous. An example of these may be given in the assignment of error that the rights of the defendant under the Federal Constitution were invaded by the charge of the court on the question of self-defense. It is difficult to see how in any aspect of it such a question could involve issues under the Federal Constitution, and certainly they do not here.

Another assignment of error is to the fact that the plaintiff in error was constantly in the custody of the warden of the penitentiary inside and outside of the court room, during the trial. It is argued that he was entitled to be free from any custody in order that he might fully make his defense and that this deprived him of due process. It is a new meaning attached to the requirement of due process of law that one who is serving in the penitentiary for a felony and while there commits a capital offense must, in order to secure a fair trial, be entirely freed from custody. *Ponzi* v. *Fessenden*, 258 U. S. 254, 265; *State* v. *Wilson*, 38 Conn. 126. There is no showing that he had not full opportunity to consult with counsel or that he was in any way prevented from securing needed witnesses. The assignment is wholly without merit.

Finally, it is objected that as the plaintiff in error was under sentence to confinement in the penitentiary for twenty years, which had not expired when he committed this murder, he could not be executed until he had served his full term.

Answering this objection, the Supreme Court of Oregon said:

"As stated, the defendants are both convicts imprisoned in the Oregon State Penitentiary and it seems from the testimony that they had escaped from prison in other jurisdictions. The defendants claim that the sentence of death imposed upon them by the judgment of the court is forbidden by section 1576, Oregon Laws, reading thus:

" 'If the defendant is convicted of two or more crimes, before judgment on either, the judgment must be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of such crimes; and if the defendant be in imprisonment upon a previous judgment on a conviction for a crime, the judgment must be that the imprisonment must com-

ence at the expiration of the term limited by such previous judgment.'

"Their theory seems to be that owing to the fact that each of them then under sentence to imprisonment for other offenses, the trial court had no jurisdiction to punish them for a crime committed while the pending imprisonment was in force. It will be noted that the section just quoted refers only to imprisonment and not to the penalty of death or fine. The section does not purport to exempt a defendant from trial and judgment for the commission of any crime during his confinement in the penitentiary. It would be shocking to all sense of justice and public security to say that a criminal confined in the penitentiary as punishment for his misdeeds could be licensed to commit other crimes with immunity; yet, that is the conclusion to which the argument of the defendants' counsel will lead. If the jury had found such a verdict as would authorize their imprisonment, the section quoted would be the authority for the court to declare, that the latest imprisonment should begin at the expiration of the term then being served by the defendants. The punishment of death is an entirely distinctive thing and is not included in the provisions of this section."

It is contended that this construction of the statute in permitting one who has committed a murder while a convict in the penitentiary to be executed before his term has expired deprives him of a right secured by the Fourteenth Amendment, in that due process of law secures to him as a privilege the serving out of his sentence before he shall be executed. It is doubtful whether this exception and assignment can be said to be directed to a ruling of the Supreme Court of Oregon such as to draw in question the validity of a statute of Oregon on the ground of its repugnancy to the Constitution, treaties or laws of the United States and sustain it, as required in section 237a of the Judicial Code as amended, c. 229, 43 Stat. 936, 937, permitting a writ of error. But assuming that it does, or, if not, treating the writ of error as an application for certiorari, there is not the slightest ground for sustaining the assignment.

A prisoner may certainly be tried, convicted and sentenced for another crime committed either prior to or during his imprisonment, and may suffer capital punishment and be executed during the term. The penitentiary is no sanctuary, and life in it does not confer immunity from capital punishment provided by law. He has no vested constitutional right to serve out his unexpired sentence. *Chapman* v. *Scott*, 10 Fed. (2d) 690, affirming the same

case, 10 Fed. (2d) 156; *Ponzi* v. *Fessenden,* 258 U. S. 254; *Rigor* v. *State,* 101 Maryland 465; *State* v. *Wilson,* 38 Conn. 126; *Thomas* v. *People,* 67 N. Y. 218, 225; *Peri* v. *People,* 65 Ill. 17; *Commonwealth* v. *Ramunno,* 219 Pa. Dt. 204; *Kennedy* v. *Howard,* 74 Ind. 87; *Singleton* v. *State,* 71 Miss. 782; *Huffaker* v. *Commonwealth,* 124 Ky. 115; *Clifford* v. *Dryden,* 31 Wash. 545; *People* v. *Flynn,* 7 Utah 378; *Ex parte Ryan,* 10 Nev. 261; *State* v. *Keefe,* 17 Wyo. 227, 252; *Re Wetton,* 1 Crompt. & J. 459; *Regina* v. *Day,* 3 F. & F. 526.

The writ of error is dismissed and the certiorori is denied.

A true copy.

Test:

Clerk, Supreme Court, U. S.